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Abortion: Challenges to the Status Quo

Edited by

YOTA KRAVARITOU
and
SALLY SHELDON

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Abortion: Challenge to the Status Quo

Workshop, Florence, 12&13 March 1993

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Abortion: Challenge to the Status Quo

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Preliminary remarks

This working paper is drawn from the results of a workshop held at the European University Institute in March 1993. The workshop was sponsored by the Department of Law (Professors Yota Kravaritou and Jessurun d'Oliveira) in conjunction with the Interdisciplinary Working Group on Women's Studies. The papers are reproduced here in the form in which they were presented, without substantial revision by the authors. A summarised report of the discussion at the workshop has also been included. The working paper was edited by Sally Sheldon, who was also responsible for the organisation of the workshop.

*Mots Introductifs*¹

Yota KRAVARITOU

Nous sommes réunis ici pour débattre de la question de l'avortement, de sa réglementation juridique et des problèmes imminents de même ordre qui se posent dans certains pays européens, tels l'Irlande, la Pologne, l'Allemagne après la réunification, la Suisse, l'Italie et aussi les Etats-Unis.

Sally Sheldon, qui a énormément aidé à l'organisation de ce séminaire et qui prépare sa thèse sur l'avortement, nous expliquera les raisons pour lesquelles ces pays ont été choisis: leur enjeu juridique tout à fait actuel.

Le contrôle de la procréation et d'autodétermination des femmes est cependant une question éminemment politique à plusieurs points de vue. La législation sur l'avortement exprime une politique de l'Etat -en dernière analyse encore toujours phallocratique- à l'égard des femmes. Or, celles-ci, en tant que sujet collectif, développent des résistances contre cette politique étatique et des pratiques; résistances et pratiques qui expriment leurs propres politiques à elles. Certaines diraient que les réglementations étatiques de l'avortement s'inscrivent aux manifestations entre, d'une part, le pouvoir générateur féminin (potenza generatrice femminile) qui est indiscernable de la corporalité concrète de chaque femme et, d'autre part, le pouvoir masculin qui veut, en ignorant la subjectivité féminine, la réduire à une simple fonction sociale. Ce qu'on trouve, en réalité, dans le discours des femmes qui prônent et revendiquent le droit de choisir, seules, tout ce qui est de leur travail, de leur sexualité et de leur procréation, est un nouveau projet de civilisation et de culture. Dans ce cadre, le droit d'avoir ou de ne pas avoir un enfant s'inscrit dans ce projet politique des femmes pour une nouvelle humanité. Loin de manifester un acte d'égoïsme, comme on l'accuse, le choix d'avoir ou de ne pas avoir un enfant constitue un acte de responsabilité de la part de la femme basé sur sa capacité concrète de l'accueillir et de s'y donner, d'assurer aussi souvent les coûts matériels nécessaires.

Dans le pays qui nous accueille, l'Italie, un pays où les luttes des féministes et de toutes les femmes (les catholiques y étant incluses) ont eu un impact sur la législation concernant l'avortement, on en parle beaucoup en ce moment: primo, parce que deux projets de loi sont déposés au Sénat visant la réforme de la

¹ © Yota Kravaritou

fameuse loi 194 sur l'avortement que certains considèrent trop libérale et, secondo, à cause du conseil donné par le Pape aux femmes violées dans les "camps du viol", en Yougoslavie, de ne pas se faire avorter.

La réaction des femmes italiennes la plus significative provient du groupe Contra parola constitué de femmes écrivains et journalistes qui, après avoir déclaré qu'elles se sentent traumatisées et offensées de la vision instrumentale que l'Eglise a des femmes, a demandé aux citoyennes italiennes de ne pas verser à l'Eglise les 8 o/oo de leurs taxes mais à d'autres institutions humanitaires². L'interdiction aussi d'une brochure sur la contraception -liée à la lutte contre le Sida- qui devrait être distribuée dans les lycées a fait de l'avortement un thème discuté à plusieurs endroits de la société italienne en ce moment. Notre sujet donc est d'une actualité brûlante pour l'Italie.

En vous souhaitant la bienvenue à l'Université européenne de Florence et en souhaitant aussi beaucoup de succès à nos travaux, permettez-moi de signaler que ce séminaire est notre quatrième de cette année, après de workshop sur "Les droits des femmes" organisé à l'occasion du bicentenaire de Mary Wallstoncraft, celui sur "Le sexe du droit du travail" et la Conférence sur "La vie quotidienne des femmes dans les pays ex-socialistes".

² V. les journaux italiens des 5 et 6 mars 1993.

The Disregard of Women's Fundamental Right in the Jurisdiction of the German Constitutional Court³

Monica FROMMEL

On June 25th 1992, a reformed abortion law passed through the German Parliament. It represents a combination of factors: public support (the right to obtain a place for one's child in a public *Kindergarten*), compulsory counselling, the restriction of places where counselling may be obtained (only in State boards or those accepted by the Government), criminal sanctions to enforce obedience and - last but not least - free choice in the first three months of pregnancy (*Fristenlösung*). The reformed law is more liberal than the previous regulation in West Germany (*Indikationenlösung*), but more restrictive than the former East German law, because in East Germany counselling was/is not compulsory. I say "is", because even now there remain some differences between the laws regulating abortion within the two former Germanies. Most of the regulations are pending judgment before the Constitutional Court. The decision is expected by the end of April 1993. Nobody knows whether the reformed law will be upheld by the Court, because the Second Senate, who will make the final decision, is known to be rather conservative. The judges are reluctant to go against the reasoning of the decision made in 1975, which held to be unconstitutional a liberalized abortion law that had been adopted by the German Parliament.

There are many good reasons, however, to change the ruling. Since 1989, social, political and legal conditions in Germany have changed. Between 1975 and 1993 all over the world social attitudes have evolved. Women require the fundamental right to reproductive freedom and the international community has had much experience with a range of reproductive health programmes and with attempts to reduce the incidence of abortion through penal laws and by other means.

It might be that a majority of at least four judges (4:4) of the Second Senate will argue that penal sanctions are a less effective means of reducing the incidence of abortion than other methods. The majority of the German Parliament used this argument. But even these judges will not present an alternative solution that is based on the pregnant woman's dignity, right to privacy, bodily integrity, equality

³ © Monika Frommel. Since Monika Frommel presented her paper in March, there have been substantial changes in the German situation. Some explanation of these changes and extracts from the German law are included in Appendix 2.

and religious liberty. In Germany there is neither a strong Pro-Life, nor Pro-Choice movement. The majority does not believe that penal sanctions are an effective way of dealing with abortion, but nevertheless the abortion debate in Germany tends to deny woman's right to reproductive liberty. The mainstream arguments are along the lines of more effective protection of potential (liberals) or unborn (conservatives) foetal life.⁴

I think it is useful to distinguish between two dimensions of the debate: a symbolic level (women's fundamental right) and a pragmatic level of argumentation. Whatever the Constitutional Court decide, they will ignore women's fundamental right. This disregard for reproductive liberty is a symbolic defeat, however a liberalized law would promote a better framework for ensuring access to legal abortion in the States and countries where the practice is very restrictive.⁵ But this is still far from being achieved as unequal patterns of implementation continue to hinder every reform.

In some cities (Hamburg, Berlin, Bremen, Frankfurt) and some States (Hessen) implementation of the abortion law is quite liberal. Allowing abortion in the presence of a social indication has in practice the function of a Pro-Choice rule, allowing abortion on request. The pregnant woman has to consult a counsellor who will attest to the presence of a social indication and another medical doctor. It is rather easy to do this, because there are family planning centres and doctors who cooperate with these centres.

However, in the southern States, especially in Bavaria, implementation of the law is very restrictive. It will be very hard to change some of these patterns of Pro-Life policy. The social indication, for example, exists here only in text books, because the Bavarian Courts interpret the criminal law statutes in the context of a conservative ideology that favours the prohibition of abortion save in exceptional cases, *e.g.* when the life of the mother is in danger (and in the presence of eugenic indications). See, for example, the trials in Memmingen which started in 1985.⁶ Even the reformed Federal law could not stop the policy of criminalisation,

⁴ Klaus Günther, *Transit* 4/1991; – Frommel, *Die Zeit* (16/8/1991).

⁵ Monika Frommel, "Lebensschützer" auf dem Rechtsweg, in *Aus Politik und Zeitgeschichte*, Beilage zur Wochenzeitschrift *Das Parlament*, B14/90 (30/3/1990), 12-20; – *Id.* Strategien gegen die Demontage der Reform der §§ 218 ff StGB, in *Zeitschrift für Rechtspolitik* (1990), 351-354; – Dagmar Oberlies, *ZRP* (1992), 264-268.

⁶ Two cases (Federlin and *Dr. Theissen*) are still pending. The *Federlin* case: Bay ObLG - 26/4/1990, *Strafverteidiger* 2/1992, 68, see Frommel, 73; – the *Theissen* case: see Frommel, 114.

because the implementation of compulsory counselling is still a subject of local organisation and regulation. We can anticipate that some States in former East Germany will learn from this Pro-Life policy.

Regarding this very bureaucratic implementation of local regulation, a pregnant woman has to consult four persons:

- the medical doctor who certifies as to the existence of a pregnancy;
- the counsellor in a public counselling board (in Bavaria there are few boards which are independent of churches);
- the medical doctor who certifies as to the presence of the social indication;
- another doctor in a hospital who gives medical advice and, after an obligatory waiting period for reflection, performs the operation.

To obtain a legal abortion in Bavaria is like a hurdle-race. After all, there is only a limited number of places where an abortion can be obtained. So many Bavarian women have to travel to other States or countries.

One of these restrictions has been overruled. Since August 1st 1992, a very important part of the reformed Federal law is still in effect: the regulation of the places where abortions can legally be performed. Qualified doctors, for example, can perform a legal abortion in their own offices. But it will be difficult to implement this regulation against a strong Pro-Life policy in a State or a region. If the Constitutional Court decides against the liberalisation of the law, the different policies regarding abortion will ensure uneven implementation of the (previous) Federal law in Germany.

A Ban on Abortion in Poland - Why?⁷

Wanda NOWICKA

On February 15th 1993 President Lech Walesa signed the restrictive anti-abortion bill (the Law on family planning, human embryo protection and conditions of admittance for abortion). It will begin to be enforced on March 16th 1993. This was not unexpected since an anti-abortion campaign had been initiated over three years ago.

This campaign has been associated with the collapse of communism, an event which had been so eagerly awaited by most of our society for so long. This political transformation has brought many necessary positive and changes but, unexpectedly, it has also brought some negative ones, especially with regard to the condition of women. This can be observed at least on two levels - economic and legal:

- the transition from a communist to a free market economy caused unemployment, unknown under communism. This phenomenon effected women to greater extent than men: women constitute 54% of the registered unemployed. Employers are not willing employ a woman, (unless she can work as a secretary and she is under 30);
- legal changes effecting women are mainly connected with the pressure from the Catholic Church and "christian fundamentalists" who advocate a complete ban on abortion.

Polish Catholicism has always been strong and it became even stronger under communism. For many it was a shelter for any political opposition. When communism collapsed, the Catholic Church started a policy aiming to institutionalise its position. The first step in this direction was that of introducing Catholic instruction in public schools in September 1990. Other examples of this policy are religious symbols and practices in offices, the Polish Parliament, the Polish army and many others. Since March 2nd 1993, it is mandatory to respect Christian in Polish radio and television broadcasts. Some fundamentalist forces are also pushing for an abolition of church and state separation guaranteed, which has been guaranteed up until now by the Polish constitution. A new constitution is currently being prepared and an article on separation, perceived by some as a remnant of communism, is seriously threatened.

⁷ © Wanda Nowicka. A translation of the new Polish abortion law is included in appendix 1

Some political groups, which are very strong in Parliament, support the reestablishment of Christian values in all spheres of life. For women this means the only acceptable role is seen as that of wife and mother. In this political context, it is easy to understand how an anti-abortion bill might be introduced.

Abortion was legalised in 1956. For various reasons (lack of sex education at schools, poor availability of reliable and safe contraception especially in rural areas, lack of reliable information, ineffectiveness of the few institutions responsible for providing information and distributing contraceptives, and a campaign from the Catholic church against contraception) the rate of contraception use was low. A survey carried out in the summer of 1991 (SGM/KRC Poland - Gazeta Wyborcza, October 16-8, 1992) shows that around 40-50% of respondents do not use any contraceptives (the figure varies according to the age group). Only 4% use the pill and 3.8% use spermicides. It is not surprising that the abortion rate is high, however the actual number varies depending on the source of information (from 60,000 to 300,000 yearly).

In 1990, the Ministry of Health tightened the rules regulating the provision of abortion at publically funded hospitals (the regulations require women to obtain permission from two gynaecologists, her local physician and a psychologist). In November 1990 Prof. Vaclaw Dec, head of the obstetrics and gynaecology department at the Medical Academy in Lodz, publicised the deaths of three women from self-induced abortions. He attributed these deaths to the existence of these abortion regulations. Prof. Dec also revealed that pressures had been put on him by the Ministry of Health to change the classification of these three cases. At the present time doctors have noticed an increased number of spontaneous abortions. For example, the director of the hospital in Zdunska Wola stated in an interview with Gazeta Wyborcza (December 18, 1992) that in 1989 they performed 74 induced abortions and treated 48 spontaneous abortions at her hospital. In 1990 there were only 19 induced abortions and 85 spontaneous abortions.

Serious restrictions on access to abortion were introduced with the Ethical Code of Physicians, which has been in force since May 3, 1992. According to this Code, abortion may be performed only when a mother's life or health is in danger or when the pregnancy is a result of crime. Genetic deformity of the fetus is not a justification for abortion. Prenatal examinations such as amniocentesis are not permitted unless it is guaranteed that the fetus will not be affected. The Ethical Code is not compatible with Polish law, where abortion is still legal (until March 16th, 1993). However, it has nonetheless caused public hospitals to stop performing abortion. Conversely, a number of doctors are still perform abortions privately at two or three times the normal price.

This schizophrenic legal situation, neither recognized nor abolished by the Constitutional Tribunal, has already resulted in many tragedies. In Silesia women with defective pregnancies (such as where the a fetus is brainless) are

obliged to carry the pregnancy to term. Such cases of deformity happen more often in Silesia than in other parts of Poland as a result of terrible pollution caused by outdated heavy industry (coal mining). According to the World Health Organisation's annual report, issued in Geneva, Poland has the second highest death rate for male infants in the world, and the third highest for female infants. These numbers are so high due to Upper Silesia, where two children per 1000 die as a result of disturbance in the genetic code.

In many cases a woman's life or health is threatened because doctors in public hospitals are working under strong pressure and are afraid of performing abortions even in the presence of serious medical indications. Several such cases have been reported by the Polish mass media. In these cases hospitals have either sent women away without even a medical examination, referring to their internal hospital regulations, or they have demanded numerous certificates, the collection of which is very time-consuming. When the 12th week of pregnancy is over, the abortion deadline enshrined in Polish law has been reached and doctors refuse abortion with a clear conscience. Some women have almost died as a result of not having had an abortion performed in good time. For example, one woman could not obtain an abortion even though her fetus was dead. Another case was that of 41 year old blind woman suffering from epilepsy. Pregnancy was the result of a rape. She was refused abortion. Another 40 year old Woman had a tumor in her uterus, hypertension and allergies to most antibiotics. She was refused an abortion at first. However she was finally granted an abortion in a critical condition, resulting from an internal infection.

In November 1992, the Extraordinary Parliamentary Commission accepted an the draft of an anti-abortion bill which was even much more restrictive than the Ethical Code of Physicians and a former draft of the bill. According to this bill, abortion could be obtained only in cases where the woman's life is threatened. Some contraceptives, such as IUD's and some new generation pills, are to be forbidden. Doctors or women who self-induce abortion could face prison sentences of up to two years. The draft evoked spontaneous resistance among some parties who had previously tried hard not to get involved in the "abortion issue" as well as among ordinary people. Zbigniew Bujak, an MP from the Labour Union Party, started up a Committee to petition for a referendum regarding the criminalisation of abortion; this was enthusiastically accepted by thousands and thousands of citizens, although there is little legal basis for it. However, in the Draft of a Charter of Civic rights proposed by President Lech Walesa, there is an article that a referendum may be initiated when 500.000 signatures have been collected. But the Charter has not yet been passed.

Nobody expected such strong popular support for the referendum. Over 20 local committees were established. People collected signatures spontaneously at work, in the street, in their neighborhoods or in shops. By January, 1,300,000 signatures had been collected. Society, passive up until now, seemed to be waking up. The

more that the anti-abortionists, including the church authorities, tried to stop the movement, the better the people understood that the struggle for legal abortion is a struggle for real democracy.

This movement certainly influenced parliamentary voting over the anti-abortion bill. During the final voting in Sejm (January 7th, 1993) and in the Senate (January 29th, 1993) this extremely restrictive draft did not pass.

According to the bill which passed, abortion would be possible, only in public hospitals, when a mother's health or life is threatened, when prenatal examinations (amniocentesis) showed serious and incurable deformity of the fetus or when pregnancy resulted from rape or incest reported to the police. Whereas doctors who perform illegal abortions will face prison sentences of up to two years, women who have illegal abortions will not face prosecution. Prenatal examinations will be possible but will be limited to such cases where there are serious grounds for suspicion of genetic deformity.

In general, professional lawyers have been extremely critical of the law, not only because of its content, but also because of the way in which it has been drafted. It uses strange language, such as 'conceived child', and 'conceived life'. Instead of the word contraception it speaks of 'conscious procreation', which literally means something quite opposite. The bill is also unclear. For example, lawyers interpreting the law are not sure whether giving information about abortions abroad will be legal. There is also a serious threat to methods of contraception such as the pill and IUDs which are difficult to obtain and are currently used by only 5% of Polish women. According to the bill, they are "early abortifacients" and they might thus be forbidden. By 'contraception' anti-abortion fundamentalists understand natural methods (e.g. information regarding all but natural methods of birth control was removed from the new edition of "Medical Home Manual" following pressure applied by church authorities). There is also much propaganda against the pill and IUDs as being very dangerous methods for Women's health.

Although the anti-abortion bill obliges educational authorities to introduce some elements of sex education onto school curricula, the vice-minister of education Kazimierz Marcinkiewicz officially stated that they did not intend to do this. He explained that "pro-family education is covered in other subject areas, such as literature or biology".

The interpretation of the law and the way in which it will be understood by authorities is very important not only for women but also for organisations which exist to help them. In 1992 the Federation for Women and Family Planning was established by five organisations. At present we have nine organisation-members - the Polish Feminist Association, Pro Femina, Neutrum Association, Y.W.C.A., the League of Polish Women, the Society of Family Development, the Democratic Union of Women "section Ewa", the Movement for the Protection of Women's Rights as an affiliated member, and the Polish Sexology Society. This Federation

intends to fight for safe and legal abortion and aims to assist women avoid unwanted pregnancies by way of sex education and contraception. One of the facilities which we offer is a hot line. Many women who call feel insecure and confused about the new law. One result has been the phenomenon of women who refuse to have sexual intercourse with their husbands.

Another movement active in the struggle for legal abortion is the Movement of Committees for the Referendum. Following the adoption of the less restrictive bill, this movement has lost some of its strength. At the present time, it faces the decision of whether to become a formalised structured organisation or to maintain the status quo.

Several public polls show that majority of Polish society is in favor of legal abortion, but not on demand. 81% are in favor when a woman's life is endangered. 80% are for legal abortion when the fetus is deformed or suffers from incurable illness. 74% are in favor when pregnancy is a result of rape or incest. 53% are in favor when a woman is in a difficult financial or social situation. Only 23% accept abortion on demand.

Finally, I would like to point out one positive side effect of these extremely unfavourable conditions experienced by women. The necessity for women to organize and to be more aware on certain issues has materialised. Polish women were given liberal regulations much earlier and much easier than many other women in the world. We took these things for granted and when most women in the world had to fight for their rights, the majority of Polish women believed in the appearances of freedom and equality. Many of us did not perceive a danger until recently. But what is given, can be easily taken away. Now, it is our turn to struggle for our rights.

Germany/Poland - Summary of Discussion

Kerstin ULLRICH (discussant)

The actual debate on abortion law in Germany can, to my mind, be discussed on three levels:

- 1) The term of 'self-determination', or better the disregard of the self-determination of women, through whatever abortion law might be established in the near future.
- 2) The separation/division of woman and foetus, which leads to more and more restrictive control mechanisms of the State over women, and which - in the worst case - might imply the use of violence on women to implement foetal treatments (as has already happened in the U.S.A).
- 3) And last but not least, the differences concerning the implementation of abortion law in the diverse federal states (Bundeslander).

I would like to shift the perspective to the less juridical, and to stress in a few words the first two points, combining them with the actual debate within the German's women's movement. The term 'self-determination' was undoubtedly the keyword for the women's movement's struggle for a liberalisation of the abortion law. Self-determination, or later 'reproductive freedom', meant women's complete control over their bodies and thus over their fertility. The struggle for self-determination or the definition of it can, in this context, be seen as the competition between two different and highly conflictual social constructions of pregnancy. The underlying assumption of the women's movement's demand for reproductive freedom is the notion of pregnancy as a natural unit or identity of woman and foetus. Pregnancy is therefore seen as the creative potential of a woman to let life develop or not: pregnancy is seen as a situation in life where the woman has to take a decision about her own life schedule. Pregnancy is a biological and psychic condition.

This notion of the pregnant woman and the foetus as a life-unit, however, is at odds with the dominant cultural construction of pregnancy which underlies the notion of the relationship between woman and foetus, and which changes the pregnant woman into a "mother" and the foetus into a "child", thus giving the foetus its own identity, its own rights, and its own subject status. The image of the woman here is that of the 'environment' of the foetus, an environment, moreover, which is sometimes hostile, and against which the foetus may require legal protection.

The struggle for dominance between these two competing notions of pregnancy - natural life unit versus foetus as independent subject - has clearly been decided in favour of the latter construction. Law, science, religion, political institutions - even parts of the woman's movement itself - support and legitimate the subject status of the foetus. A decisive factor which has accelerated and intensified the trend towards the construction of the foetus as an independent person (in other words the trend towards the alienation of woman and foetus) is the development of scientific-technical innovations.:

- with the technical possibility to make the foetus visible and to show with time-lapse film its development, its movements and reactions, the foetus increasingly takes on its own shape and is no longer considered as a unit with the mother. Those photos and films of moving fetuses have often been used in the context of anti-abortion campaigns.

- a second and, to my mind, more important technological step is represented by reproductive technology. This technological development continuously separates/loosens the life-unit of the pregnant woman and the foetus. The technical possibility of a foetus surviving outside of a pregnant woman influences, or rather constructs, a social perception of a pregnant woman as being a mother and the foetus a child, and that makes it an independent subject.

Now, what are the implications of these technological developments for the women's movement and its struggle for a liberal abortion law? To my mind the women's movement has failed to respond adequately to this new challenge. The debate on abortion, which is currently clearly dominated by pro-life activists and organisations, is linked with the debate on ethical problems of genetic and reproductive technologies. This link brings the women's movement into a defensive position, as activists are now reproached with an accusation of double moral standards. This means that those who are in favour of a permissive abortion law may not reject reproductive technologies. In other words, if the women's movement has no ethical problems with abortion, then it cannot have ethical problems with genetic experiments involving fetuses either.

Another problem for the women's movement is that the former political slogan of 'self-determination' has to be redefined in face of the reproductive possibilities that the new technologies offer. If self-determination means to have control over one's own fertility, then why not accept a technology which will enable women to have a child by in-vitro fertilisation? If self-determination means the right to have an abortion, why does it not mean the right to a child, to artificial insemination, to surrogate motherhood, to frozen fetuses for a later pregnancy and so on? Up until now, the feminist discussion in Germany has been unable to find ways out of this vicious circle, and has remained unable to shift the focus of the debate away from the foetus and back to the woman! Therefore the leading role in this debate has been taken over (or perhaps rather a new debate has been initiated) by the anti-abortionists ("Lebensschutzer"), with politicians, church and anti-abortionists acting in concert. The public attention which they attract is

increasing, not least because their strategies have changed. Instead of shocking the public with colour photographs of fetuses during an abortion (a strategy pursued in the seventies), the trend goes more and more towards the use of subtle arguments which even adopt the rhetoric of the women's movement: for example, the need to value unmarried mothers more highly; appeals to the responsibility of men as fathers ("For a family you need three persons: father, mother, child"), and so on.

To conclude, one might say (pessimistically) while awaiting the judgment of the Constitutional Court, the public debate (where this occurs) is nearly exclusively dominated by the anti-abortionist activists, who currently hold what I would describe as 'the power of definition'.

Monika Frommel: Self-determination is one term in the Constitutional debate, constructed on the basis of morals, and is seen as a right. Within the German debate I would also stress religious freedom (*persönlichkeitsrecht*). Reproductive freedom is an American export. Within the feminist debate there are different schools of thought. My own opinion is that I don't have a problem in saying that a woman has a right to have a child if she wants one. At the present time she has no real right which will be enforced against doctors. There are many social problems connected to the new technologies, but women should have the right both to use (and to refuse) the new technologies.

I believe that you can construct the rights of women on many different ideological bases. The new technologies are 'ambiguous'. Even the notion that the woman is separated from the foetus can be used in different ways. There are too few women in the scientific and legal communities - we do not have the power of definition. We should not be however against the development of the technologies *per se*.

Anne-Marie Rey: Kerstin is right when she says that discussion is dominated by the anti-abortionists. What I have found in Switzerland is that today even feminists use words used by the anti-abortionists. They speak of a woman wanting to abort her child, they talk of a miscarriage. People counselling women invariably stress the need to get over the abortion, how this is a difficult process which takes time. I say, let's banalise abortion! We are so afraid of the 'Right to Life' movement, that we have started taking over their language.

Monika Frommel: The term reproductive freedom has the advantage of being general but not too general. In a European context, we need to find words to express what we are trying to say, to win the rhetorical fight. In European context we haven't created new words which we can use in both the public debate and in a technical sense. The Pro-Life has been very good at this. In a European context there is a problem in that there are two wings and a very strong feeling against the technological developments, there is a fear that women cannot say: 'it's

my right to refuse' - that the treatments will become compulsory.

Kerstin Ullrich: It is not only the right to refuse a foetal treatment which is at stake, but there is also a problem in that women can be forced to have an abortion as soon as it is known that the foetus is abnormal. This is not a fantasy, it is a reality. There is a lot of pressure on women not to have a child with a handicap because of the high social costs involved. This is the direction in which we are heading, and the moment when the women's movement can influence this development is over - we have lost this symbolic fight.

Hege Braekhus: The Norwegian feminist movement used the following slogans - to give birth against your will is a violence, and every child has the right to be wanted.

Anne-Marie Rey: Kerstin spoke about the problem of women being forced to abort handicapped fetuses. This is a very dangerous argument, and one which might be turned against women, as anti-abortionists have argued that legalizing abortion would result in women being forced to make use of it by their husbands or families.

Ellen Goetz: We should not be against the new technologies per se, rather we need to be vigilant with regard to how that technology is used. We must ensure that women can refuse it.

Ulli d'Oliveira: With regard to the new technologies, it's very difficult to fight them - once they are there they will be used in one way or another. The question is rather one of control. It is interesting that although there is already potentially a market for a late morning after pill - let's say 'early abortion pill', there is tremendous resistance to it. This can be explained in two ways: its introduction into certain national markets is forbidden by national governments, and secondly you can see why - bureaucracy involved in obtaining abortion prolongs the gestational development of the foetus. If you are able to be quick about it, you do away with the bureaucratic decision making process.

Marina Calloni: The problem is not merely one of the technologies, but also of women's identity. In Italy we have tried to analyse the new identity of women, and we discovered that a lot of women (including those in the feminist movement) have made a shift away from the language of rights towards that of ethics. We also need to think about how the law is justified and legitimated. The way that Italian women justify the law now is very different from the way in which we thought about it in the seventies. In Italy the feminist movement required a law dealing with abortion in order to ensure hospital services and social rights. On the other hand we also need a space where the woman has the freedom to choose. In this sense, I want to ask Monika, how is it possible to understand the limitations on the woman in the face of legitimate power? What role does viability

play? How does this limit self-determination? How do you understand the problem of limitations over the choice of women at the level of political justification or medical procedures.

Monika Frommel: Self-determination is a normative approach, which means I define a human being as a person who can decide, and who can use rights. It's difficult to refuse a foetal treatment but I cannot find another normative solution in modern society, other than to say a woman has a right, and no one can force her. It is another problem to analyse the conditions of the exercise of this right - this is an empirical, sociological matter - but we are here in a normative discourse, and in a normative discourse it is very important to defend rights, values and ideologies. Every right is limited - the limits are very strict. Rights are always embedded in a ranking system of other rights - really you don't have a right, rights are limited. To define the limits is a pragmatic problem - so to argue for abortion within three months refers to a pragmatic limit on free choice. There is no rational reason for adopting this limit. You say three months because it is a conventional argument. You could say five months, but practically speaking we see that three months is enough.

It is important to set the argument in terms of individual rights. In a European context, women find it difficult to argue in this way, because there is a strong anti-liberal trend within feminist discourse, and much use of anti-liberal arguments - like arguing that we need to protect women by law - I would say, never do this! To protect women we need good organisation and a good network of self-help groups, so you can give women information and help them that way. I would never suggest trying to protect women by law!

Susan Bowers: The basic thing we are arguing about here is the power of women. There is no intrinsically bad technology - it depends on how it is used. Forcing a woman to continue a pregnancy, is as bad as forcing her to discontinue it. What we need is more women in the law-making bodies, more women in the health service - we need more women everywhere! The thing is to trust each and every individual women to make her own decision. All the things that we've been talking about - the technology, the counselling, the physical abortion services - all of these are good things if the woman is allowed to decide whether she wants to use them or not. For some women abortion is a traumatic experience, for some women it is a banal experience. Each woman is different. We can't enforce protection of women - you have to trust in their own power, and their own sense of right of what is right for them. We need to be fighting for the availability of all of these things and the ability of each woman to choose.

Ursula Barry: The experience that the Irish feminist movement has had over the last 100 years, is one of having to oppose the attempts of the anti-abortion movement to restrict access not just to abortion, but also to contraception, IVF, genetic counselling and amniocentesis. The moves that we've faced to restrict

access to abortion have been linked to restrictions in a whole set of other areas, including that of reproductive technology. The feminist movement has been put into a position of trying to defend sterilisation, contraception and infertility treatments. From what Wanda said about Poland, I would say that there is a lot of similarities there, where amniocentesis and certain kinds of contraception are equally under attack by certain segments of the anti-abortion movement. We need to recognise that even in this debate, the practical reality and the points of confrontation between the anti-abortion movement and the movement for the freedom of women's choice take different lines within different states.

One other point - we shouldn't fear that sometimes the anti-abortion movement sometimes has to use our language. This is a reflection of their defensiveness. It's a problem when the feminist movement starts to use their language!

Olwen Hufton: Surely one of our problems is the language of rights itself. Women's rights have no bigger enemy than foetal rights. This originates from Catholic natural law philosophy, but what it has grown into is something quite extraordinary in certain national contexts. So it's alright to have an abortion up until 16 weeks - where does that appear in natural law philosophy? You could say, what rights can anything have which is totally dependent, which has no existence other than being fed through the blood of another individual? Surely one does need to come back to the use of language - and the language of rights I find particularly bothersome. Rights are wonderful if they are the *right rights*! But when you are fighting something which has rights which is not a real person, then you are in real trouble.

Sally Sheldon: I think that it is very interesting to discuss the language that we can use in the formulation of claims. However, I think that one particular problem which we face is that the language which is going to be most successful in the short-term, or in the immediate, is the least radical. The language which most represents what we really want is least likely to be accepted. So, if we formulate claims in medical language, in terms of speeding up abortion procedures, those are more likely to be accepted. If we adopt a more woman-centred rhetoric, if we say that women are mature and responsible and should be allowed to take their own decisions, that language just isn't listened to.

I had a very strange sense of *deja vu* when I was listening to Kerstin's discussion. What she is describing is really very close to what is happening in the UK. The debate is becoming increasingly foetal-centred. And the reaction to that of women in Parliament who are fighting for choice, has been in some instances to resort to a eugenicist rhetoric. There's one lovely interchange in Parliament where Anne Widdecombe says that the whole Pro-Choice campaign is illogical as there is no difference between a foetus at twenty weeks inside a woman, and a foetus at twenty weeks maintained within an incubator. The Pro-Choice response to that,

which comes from Emma Nicholson, is not to say: 'well hang on, there is a difference - there is a woman involved in one instance and not in the other'. The reaction is rather to say: 'no that's not true, because in the first case we can't see the foetus and it may be deformed'. So that's the sort of language that we've been pushed back into using, and that sort of language has been tremendously politically effective. Since 1990 we have abortion in the UK up to birth, in the case where the foetus is handicapped. So the point I'm really making, is that we are always making tremendously complex trade-offs when we talk about how we are going to formulate claims, and we really have to be aware of this tension: short term, political expedience does bring concrete gains for women but it possibly leaves us with an unacceptable form of law, with long term problems or using a form of argument which some feminists may find offensive.

Susan Bowers: I think that is alright as long as you keep the long term goal firmly in mind. If we end up talking in the enemy's language, as it were, and we can get a more progressive form of law. But are we sacrificing too much in adopting this way of thinking about the issue in this way?

Sally Sheldon: I have a question related to this, for Wanda. Can she tell us what sort of strategies - if any - have been envisaged by Polish women's groups to try and counteract the new Polish law?

Wanda Nowicka: The feminist movement and other women's organisations are not very strong in Poland. I'm listening to the very high level of this discussion - which arguments can be used, which should not - this is not the issue for Poland. We have a terrible problem - no one uses arguments of reproductive freedom or self-determination. One thing which I want to learn here is how can these arguments be used to be convincing, and to be acceptable to people who agree with us, but don't know how to say so. Language is very important, and especially in Poland. For example, does someone conceive life, conceive a baby, or conceive a person? We are not so quick to find counter-arguments. I'm expecting some help from some of you in respect of argumentation!

Monika Frommel: Its very important to think about the cultural context in which a feminist movement is embedded. Would it be a good idea to argue about religious liberty in a country where the Catholic church is important? In the theological context of the Catholic church, religious liberty is important. And this means that a Catholic woman wants to refuse an abortion then this is her right. Likewise, another woman who doesn't want a baby must be able to refuse that. Religious conscience means that a woman can say: 'I don't want an abortion, but I want to be able to decide this myself'.

Eleanora Eckmann: I think religious freedom is not a good translation for "Gewissensfreiheit", because if you take Catholicism, Catholics don't have this concrete "Gewissensfreiheit". If the Pope says that abortion is a religious crime

and you will be excommunicated if you do it, there is no religious freedom to say: 'but I would like to choose'. This does not exist in a Catholic way of thinking. This is a typical German possibility, because there one has the Lutheran culture and religion, so you can work with this concept. Translating this for Ireland or Poland as a discourse of 'religious freedom' would be counterproductive. A better argument would be one based on dignity.

Monika Frommel: But this is so weak!

*Some Remarks Concerning Developments in Abortion*⁸

Marina CALLONI

Before introducing Claudia Mancina's paper, I should like to make some remarks on the intellectual dynamic of this seminar. One of the most interesting things to have emerged in this workshop has been the multiplicity of points of view which have been expressed on the same political-theoretical front, called "pro-choice", a position which insists on the priority of the woman's choice concerning abortion. In fact the term "choice" covers a wide range of different positions, many of which have emerged in this workshop. These differences are related to various languages, national cultures, juridical codes, feminist traditions, and also to the various different political generations. It should also be stressed that the way in which women speak about abortion differs according to whether it is permitted or forbidden in their country and, where it is allowed, whether there is satisfactory availability in practice.

This complicated international context adds to the challenges that women have to face in the arena of public conflicts and especially in the presence of technological developments which "objectify" the foetus as an autonomous human being in itself, removing it from its relationship to the pregnant women. But what language is it possible to use to talk about abortion? Legal, social, political, psychological, philosophical or medical terms? These specialised languages can sometimes enter into collision with each other. What is certain is that abortion and the problem of its decriminalisation and liberalisation has been for some decades an international *cultural* problem (and not only a religious one), that is a cause of many conflicts both at the level of the state and in day to day female life, regardless of whether it is legal or illegal. This "local" element makes it difficult to consider abortion in universal, homogeneous or definitive terms. Historical experience shows abortion to be a "reversible" question that is never resolved once and for all (as is demonstrated by the Polish case).

In this mixture of principles and values, expressed in the different national constitutional laws, abortion is allowed where the right of privacy and reproductive freedom are acknowledged, and forbidden where "the right to life" is accorded priority over other rights, especially where such a right is conceived as being "from the beginning", or "from conception", thus protecting the foetus as a

⁸© Marina Calloni.

human being. The problem is a difficult one of finding the procedures and the criteria, with which is possible to demonstrate the priority of the right to choose over other constitutionally protected "values", such as the right to life or the reproduction of society. (In many cases, the foetus is not recognized as a legal person, but is nevertheless protected under the maxim "human life has to be protected from the beginning").

The historical experience of pro-choice campaigns has contributed fundamentally to the constitution of a strong, positive and active, collective as well as individual, "female identity" which existed even prior to the feminist movement and then to a theory of gender. I think that both the political and theoretical branches of the women's movement has to develop stronger and more convincing arguments in response to the liberal ones - for example, the absolute concept of "the property of one's own body", or the "communitarian" arguments, or those of the proponents of "difference theory" positing "female virtues". This implies a redefinition of the boundaries between the public and the private, the sphere of individual autonomy and that of State intervention. At the same time, women acknowledge that they are not any more the "central" and privileged subjects of the fight against discrimination, but rather are among a variety of social actors who are harmed by it. The woman is a social actor in the public arena, in which different conceptions of validity come together and collide. For this reason she has to show the correctness of her position, to "justify" the argument for abortion with regard to concepts of self-determination, autonomy and reproductive freedom in a "concretely" intersubjective sense, rather than in a "self-centred" sense.

Abortion question is in fact no longer seen only in terms of the language of rights. On the other hand the debate on abortion no longer concerns "gynecological" issues, instead it concerns questions of a new interpretation of social justice through a critic of a merely formal and paternalistic concept of justice, and the different perceptions of the value of life. It means also the value that is attributed to children. This change of value and emphasis leads to women and men sharing the responsibility of according greater protection to children as conceived as weakest members of society.

If a democratic society wants to be really "just" and "balanced", it cannot fail to acknowledge that in conflictual cases priority has to be given to a responsible legal subject. If this priority is not given, and constitutional rights are negated, then damage is done to democratic presuppositions. Women have to decide in a responsible way. This means that their choice is irreversible, but they are also the subjects closest to the object of the choice. They are the centres of consciousness, in which all the conflicts are combined. However, the argument regarding rights has to be sustained by women who affirm their individual and collective identity in a discursively "argumentative" way against power and other social actors. It is necessary that women do this with theoretically and politically convincing reasons, which represent adequately the consciousness achieved by women, rather than

defensive forms of "self-pity", that can no longer found a congruent strategy.

Abortion is a "wrong" that has to be dealt with. We have to consider ways in which it (and all the pain that it implies) can be prevented. The law of abortion should be thought of as an instrument which we can use to achieve a decrease in the abortion rate. But perhaps technology will help us. Perhaps, through the use of the pill RU-486 we might hope to resolve the problem in itself. Technology and pharmacology could help us to dissolve the ethical, political and juridical conflicts of abortion. But is it not perhaps possible that in the future, women will be in a position of having to fight to "get back" what science through genetic experimentation has tried to take away from their bodies (i.e. the foetus), if major breakthroughs are made concerning "the artificial womb"? The issue will be then to think of the foetus, as if it already existed outside of the womb. This "disjunction" between woman and foetus is always a "wound" as much for the mind as for the body.

***The Italian Debate on Abortion and Self-determination*⁹**

Claudia MANCINA

During recent years the Italian abortion debate has revealed a new facet; formerly political, it has now become moral (even if many men and women do not realise or are unwilling to admit it). A political debate is one in which a person belonging to or representing a group speaks according to the interests of that group. The opposing interests can reach a political settlement and a noble solution - that is a solution corresponding to principles of public philosophy - but they do not require a real confrontation of moral concepts.

A moral debate in the true sense of the word is one in which the participants maintain moral positions, that is they argue their position from "a disinterested perspective which may be adopted by any member of society whatever his/her particular conditions might be (class, race, sex)" (Gutmann-Thompson, "Moral Conflict and Moral Consensus", in *Ethics*, October 1990).

In Italy, abortion's shift into the field of ethics took place with great difficulty due to the blind eye turned to ethics by the main cultural currents in our country (whether Catholicism on the one hand, or Marxism on the other). It should be emphasised that this shift was caused by the diffusion of bioethics. This influence should be viewed from two different angles: firstly, bioethics forms a new cultural background which is absorbing the question of abortion into its sphere thus providing it with a new perspective; secondly, now the question of abortion finds itself in a new context which, due to different medical conditions, technical instruments, and above all the subjects involved, is no longer the classic context in which the great and opposing opinions of the Seventies were formed.

We could also mark this shift in the issue of abortion affair by tracking the development of the characters involved: from the woman who, because of lack of contraceptive means and culture, resorts to abortion in a shadowy backstreet often risking her life and health; to the emancipated and informed woman who resorts to abortion due to the inability of existing contraceptive systems to cover an entire fertile lifetime and also, of course, to neutralise women's unconscious ambivalence about maternity; to the current dilemma arising from prenatal diagnosis, which not only involves the woman or the couple, but also the doctor who is in possession of the diagnostic techniques.

⁹ © Claudia Mancina.

Of course there is a tendency to oversimplify in a reconstruction of this type, in the sense that the former character has neither disappeared nor can she be considered irrelevant. But oversimplification serves to throw light on the fact that in time the weight of the moral problem has shifted, and this shift is being felt throughout the whole issue of abortion.

Today we are witnessing the rapid development of genetic and medical techniques which can intervene in the initial phases of the creation of life as well as in the life processes of living beings: experimentation on embryos, assisted insemination, but also transplants and certain therapies for genetic diseases. This has led to new questions being raised concerning the legitimacy or otherwise of these techniques. In the past, "the protection of life", which was almost exclusively a religious concern, was only focussed on abortion. The widespread convergency of lay and democratic opinion in favour of the legalisation of abortion was supported by social and political rather than ethical arguments.

In the current diffusion of ethical problems, a much broader movement including lay persons (in the name of an ethical reading of rights) and environmentalists (in the name of an ethical respect of nature) is linking a rejection of medical and scientific intervention with a new rejection of abortion. A real shift of meaning is taking place in the semantic area of "life": if we value the lives of animals or even non-living nature, the embryo or the fetus is drawn into this general re-evaluation. Seen from this perspective, the argument as to whether the fetus is a person or not could become an irrelevant one. If we use the language of rights it is clear that the assertion of animal rights or even more so that of the rights of future generations could also involve the rights of the embryo and the fetus.

This cultural change poses an ethical challenge to women's thinking, which cannot be answered by the mere vindication of our freedom over our bodies. Today, much deeper and more powerful thought is required, and the capacity of the argumentation must therefore be well-constructed and ample. For some time, a new way of reflecting on abortion has existed, which no longer see it as a social question nor merely as an individual right; this reflection sprang from our experience of the law and its effects on the lives of all women and indeed everyone. This reflection has in particular availed itself of psychoanalytical and sociological techniques and theories. However, it has been more difficult to achieve a truly ethical reflection. I believe that this must now take place without avoiding an encounter with lay bioethics.

The central point of this discussion is self-determination, that is a woman's right to make an independent decision for which she alone is responsible. Supporting women's self-determination does not necessarily mean holding a particular view on the morality of abortion. It merely means that only a woman can be the subject of such a decision, precisely because of its controversial nature, and that no-one can decide the outcome of a pregnancy in the place of the person to whom

it happens. The paradox of pregnancy is too often one we prefer not to see: the development process of a new individual which takes place in a body endowed with self-awareness. An individual, therefore, who despite being the location for this development process, does not cease to be a subject and citizen.

There may be contradictions and even conflicts between these two aspects of pregnancy. Whatever the solution may be, it must take place within the conscious subjectivity of the woman, that is of the individual who carries the conflict within herself.

Women's self-determination is relatively independent of the ethical evaluation of abortion. It can only be denied in the event that abortion is considered murder, as indeed it is by the Catholic hierarchy and the Life movement today. It should however be noted that for the majority of its long tradition the Catholic church has not considered abortion to be murder but rather a serious sin of moral intemperance. The new emphasis on abortion - which has even been compared by the Pope and some of his bishops to the Nazi atrocities - should probably be attributed to general motives, linked to the aim of evangelising the west which this pontiff has set himself. In the difficult confrontation with the consciences of men and women of western society, the Catholic Church seeks spiritual unity and identity on a moral level, in particular that of sexual morality.

Once the comparison of abortion to murder has been excluded, a myriad of other possible arguments remain. But in any case, whether abortion is considered as evil, or whether it is judged according to the case and the circumstances, the independence of the woman's decision not only is unquestioned but is even strengthened. Who else could in fact consider all the facets of the decision, taking full responsibility for it? Whoever wishes to take upon him/herself this decision - even if this were the community - would have to do so by exercising power over the body of another individual, which is not admitted in our moral civilisation.

We must recognise that women, like men, are subjects of moral experience, even during pregnancy. This experience implies that the fetus and the woman cannot be viewed as two independent individuals unless we wish to deny the very basis of pregnancy: that the fetus resides within the body of the woman, in a relationship with her which constitutes its ethical status as well as its biological one. This relationship is not only a physical fact, it also has ethical relevance, and it contributes to a concrete definition of the subject under discussion. If the woman and the fetus cannot be considered as two independent individuals, the right to life of the fetus cannot be considered an absolute right, but it is rather a *prima facie* right, that is a right which must be considered and judged in the light of other rights and interests. The taking into consideration of the various conflicting rights and interests, and the various life projects involved is precisely what a woman does when she contemplates a possible decision regarding the continuation of her pregnancy. Taking this experience seriously means taking this act of

consideration, which belongs to moral subject and therefore to every woman, seriously.

The legalisation of abortion marks a vital moment in the acknowledgement of women's status as independent and responsible moral subjects. Abortion is not, as some would have us believe, an effect of the consumerist and egoist mentality of a secularised society. On the contrary, as everybody knows, abortion has always existed, and has always been a bloody and violent method of birth control and one which results in risks for the life and health of the woman. Its legalisation is a condition for women, recognised in their independence and full decisional responsibility within the law, to no longer have to undergo abortion but to be free to choose it, and, therefore, progressively to no longer choose it as a method of birth control. In other words, to draw abortion into the sphere of women's freedom is also the only way of preventing its occurrence.

Our experience of Law no. 194 in Italy confirms this with the force of numbers as well as facts. According to a report of the Minister of Health, in 1991 there were only 160,532 voluntary abortions, that is 3.3% less than the previous year. This confirms the constant downwards trend, which shows a total reduction of 31.4% with respect to 1983. We must add that this reduction mainly involves married women with one or more children, the group of women in Italy who make most use of this law. The figures relating to back-street abortions - 70% of which take place in the South, where the law is unevenly applied due to lack of health structures - suggest that they have decreased by 17% with respect to 1990, and 40% with respect to 1983. Furthermore, only 28% of these are repeat abortions (as opposed to a previous figure of 38%).

The above data shows that the application of the law has had an undeniably preventive effect. Legislation does not result in indiscriminate and "easy" recourse to abortion; on the contrary it has led to a reduction in its incidence.

As far as Italian women are concerned, this leads to the conclusion that self-determination is not only a question of women's right to choose, which as moral subjects and citizens cannot be denied to them, but it is also the only effective way of impeding abortion and progressively reducing it.

While the moral debate is legitimate and appropriate, the political debate has no choice but to begin with legalisation. What must be done on a political level is to guarantee an improved functioning of Law no. 194: its modification in a restrictive sense would in no way be justified by its current application and the only effect it would have would be to dangerously increase back-street abortions.

*The Current Status of Abortion Rights in The United States*¹⁰

Ellen GOETZ

Before discussing the challenges that we, as reproductive rights lawyers and feminists, face in the United States, I'd like to begin with a brief overview of the recent history of abortion rights in the U.S. During the last twenty years, the U.S. Supreme Court's 1973 decision in *Roe v. Wade*, 410 U.S. 113 (1973), has been the focal point of the debate over abortion in my country. In this landmark case, the Court noted that individuals had a fundamental right to make certain private decisions free from governmental interference and said that a women's right to choose whether or not to bear children was just such a right. The Court then outlined a legal framework based on the length of a women's pregnancy: during the first trimester of pregnancy (roughly the first twelve weeks), a woman, in consultation with her doctor, was free to choose an abortion without interference by the state; during the second trimester, the state could impose some regulations, but only those that were designed to protect the women's life or health; after the fetus became viable, a state could go so far as to prohibit abortion, but must still allow the procedure in cases where a women's life or health was endangered. More important than these specifics, however, was the legal standard by which abortion restrictions had to be measured. Because the right to choose abortion was a fundamental right - like the right to vote or to speak freely or to practice one's religion - it deserved the highest level of protection against government intrusion. In legal cases, the Government had to prove that a restrictive law was designed to protect a women's health or, after fetal viability, to protect "potential life". Because this was a very difficult standard to meet, most restrictions passed by state legislatures were subsequently struck down by the federal courts.

The importance of *Roe* also stemmed from its recognition of not only the right to privacy, but also the need to ensure the equality of women. This explicit recognition of women's changing role in society - as illustrated by the growing women's movement in the United States - prompted an immediate anti-choice backlash in the states, as well as the federal government. Across the country, opponents of abortion - most of whom also opposed the other changes being made in women's place within society as a whole - organized into a political power that far outstripped their actual numbers and began passing new laws designed to restrict women's rights. Although most of these laws were declared

¹⁰ © Ellen Goetz.

unconstitutional by the courts, there were two very notable exceptions - the restrictions placed on low-income women (who are disproportionately women of colour) and those placed on young women. Perhaps the one restriction that has had the greatest impact on the most women in the United States is the Hyde Amendment, which forbids the use of federal monies for abortions not necessary to save a woman's life.' As you may know, the U.S. still has no universal national health care system, but it has established two separate programs designed to provide comprehensive health care to low-income people.

Despite the Hyde Amendment, states can choose to provide Medicaid services that are not federally reimbursable. Currently, thirteen states either voluntarily or under court order fund low-income women's abortion services under most circumstances. Medicaid - and the elderly - Medicare. Because of this restriction, Medicaid, which is jointly funded by federal and state governments, is no longer able to pay for poor women's abortions except in cases where continued pregnancy endangers a woman's life. Although we went to court to fight this law, the Supreme Court upheld the law, saying that it was not the state that was preventing poor women from obtaining abortions; instead, it was the women's poverty that prevented them from getting the kind of medical care they wanted and needed. This decision has been devastating for poor women, who rely on the government for their health care services; because of the Medicaid cutoff, many women have been delayed in their efforts to seek medical care, have resorted to unsafe illegal abortions, or have been prevented altogether from obtaining an abortion. Women have been forced to use money they would have otherwise used for food, shelter, clothing, or other necessities so that they could terminate an unwanted pregnancy. In Mississippi, for example, our abortion provider clients have told us of women paying for their abortions with rolls of nickels, dimes, and quarters. While the restriction on Medicaid funding is the most glaring and wide-ranging of restrictions placed by the federal - and most state - governments, it is not the only one. In particular, the federal government has used its power to spend money in ways that discriminate against the abortion choice. Today, anti-abortion restrictions appear in a number of places in federal laws and regulations - affecting everything from the funds for scientific research to aid to international family planning organizations.

The other group of women who have faced the greatest restrictions on their reproductive choices have been young women. Under the guise of "protecting" both young women and the sanctity of the family, a number of states have passed laws requiring young women to either notify or obtain the consent of one or both parents for their abortion decision, or obtain a waiver from a judge. The greatest difficulty in fighting such laws in the legislatures has been the seemingly reasonable nature of such a requirement. For most people, the initial reaction to such a proposal is "Well, I'd want my daughter to tell me". This reaction changes, however, when the consequences of such laws are explained. For example, studies have shown that most young women involve at least one parent; the younger the

woman, the more likely her parents are to know about, and even to have suggested, the abortion. Those who could not involve their parents often had very good reasons for doing so: some came from families in which they or other family members were physically, sexually, and/or psychologically abused; others had parents who were extremely ill and who they wished to protect; still others had parents who threatened to make them leave home should they become pregnant. When such laws are passed, young women - who, for a number of reasons, are more likely to seek later abortions - are delayed even further as they decide whether they can involve their parents. This delay increases the risks to their health. Other young women decide that they cannot either involve their parents or go to court, and either carry an unwanted pregnancy to term or resort to a dangerous illegal or self-induced abortion. Nearly two decades after the Supreme Court said that abortion was a constitutional right, pregnant young women have attempted to self-abort by throwing themselves down flights of stairs or taking dangerous drugs. In 1988, 17 year-old Becky Bell, who lived in a state with such a law, died as the result of a massive infection following an illegal abortion. Her parents have since become tireless opponents of such laws.

With the election of Presidents Reagan and Bush - each of whom made abortion rights a target and who appointed a majority of the federal judges currently on the bench - we began to see not only anti-choice legislation, but cut-backs in constitutional protection. Since 1989, the growing conservative bloc on the Supreme Court has upheld a law that banned the performance of abortions in public facilities in Missouri; a law requiring young women in Minnesota to notify both parents before obtaining an abortion, or get a waiver from a judge; and federal regulations that forbid doctors and clinics receiving funds under a federal family planning program to even tell their patients about the option of abortion. With each case, the Court's conservative Justices increased their call for the overturn of *Roe v. Wade*. It was in this atmosphere that we appeared as lawyers in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), and asked the Court to strike down Pennsylvania's restrictions on abortion.

Because everyone from both sides of the issue believed that this was the case that would overturn *Roe*, the decision in *Casey* caught us by surprise. In fact, on the day the Court decided this case, five or six of us were huddled around the fax machine, reading the opinion as each page was sent to us and we had to keep asking each other "Did we win or lose this case?" That, unfortunately, is still a question we're debating among ourselves. What we do know, however, is that this decision will be a new focal point in our struggle for reproductive rights.

Very briefly, in a divided decision, the Court stated that bans on abortion - even if they have some exceptions - are unconstitutional. At the same time, however, they upheld a number of restrictions, including a mandatory waiting period and a requirement that doctors offer their women patients with state-prepared materials on abortion, materials that are designed to discourage a woman from

making the decision to terminate her pregnancy. But more important - and more troubling - than the specifics of these restrictions is the new standard of review set by the Court. In essence, the Court said that the government could place some restrictions on women seeking abortions, but could not impose restrictions that placed an "undue burden" on these women; it then said that the people who challenged the law had to prove that the burdens were "undue". The first question that comes to mind, of course, is what is an "undue" burden? Unfortunately, the Court did not answer that question, which means that we will spend years in the courts fighting over the meaning of that term. Making it even more difficult, the Court abandoned its requirement that the government must remain neutral in the abortion decision, and stated that it could now favor one pregnancy option over another. In many ways, this is like saying that even though you have the fundamental right to vote for the candidate of your choice, the government can force you to read a pamphlet about one particular candidate before you are allowed to enter the voting booth.

While the legal battles were going on in the courts, abortion rights (as well as the general concern for women's rights overall) became an increasingly important part of politics and elections. After the nomination hearings for Justice Clarence Thomas - and the spectacle of an all male panel of Senators trying to deal with the issue of sexual harassment in the workplace - many women entered political races, and a record number of them were elected. In addition, after twelve years of an overtly anti-abortion Presidency, we also elected a pro-choice President.

With a "friend" in the federal executive branch, pro-choice activists are now hopeful of changing the many anti-abortion restrictions put in federal laws and regulations during the last 16 years. In fact, President Clinton recently took a step in the right direction by issuing executive orders that reversed several discriminatory regulations, including the ban on abortion counseling in clinics that receive federal funds, and the ban on federal funding for fetal tissue research. Moreover, with the knowledge that we no longer have a president who will automatically veto pro-choice legislation, we are now able to proceed more confidently as we attempt to pass affirmative legislation to protect women's reproductive health rights.

At the same time, however, President Clinton has not been uniformly on the side of women's autonomy on the issue of reproductive rights. For example, as Governor of Arkansas, he supported legislation that required young women to involve their parents in their abortion decision. Moreover, the election did nothing to change either the legal precedents set by the Supreme Court in the last several years or the conservative composition of federal courts, particularly the Supreme Court. It is these Justices who will continue to determine the constitutional protection given to abortion and other reproductive health rights.

We also still face anti-choice state legislatures in many areas of the country, which

will continue to pass laws in an attempt to restrict abortion and other reproductive health options. Although most of these laws will be about abortion per se - and most will contain the type of restrictions upheld, for the moment, in *Casey* - we expect to see a number of different restrictions on women's ability to make reproductive health care decisions. Thus, we expect some states to try to influence poor women's child-bearing decisions by, for example, requiring the insertion of Norplant as a condition of receiving welfare grants. Others will try to advance the theory of "fetal rights" - the notion that fetuses are human beings deserving of equal or greater rights than pregnant women - through laws singling out women who use drugs or alcohol during their pregnancy for prosecution under child abuse or drug trafficking laws. Still others, particularly on the local level, will try to restrict the type of information available to young people in schools or other community fora about sexuality, contraception, and abortion. This is especially important given the appalling lack of contraceptive information and services in the United States. Largely as a result of the U.S.'s failure to provide reproductive health care services and information, forty-six percent of all women of childbearing age in the U.S. are reported to use no method of birth control. The comparatively high birthrate and abortion rate among young women in the United States - where there are over 1 million unwanted pregnancies a year - can be traced in large part to the lack of free or low-cost contraceptives and abortion information.

In addition to these efforts, opponents of abortion will continue their vicious tactics against those who provide abortion services to women. Ever since *Roe* was decided, opponents of abortion have not only organized themselves in the political arena - putting money, time, and votes into local, state, and federal elections - but have also organized blatantly illegal and violent acts. Women who seek abortions have not only faced the mobs that sometime gather outside clinics, but have also been tracked down and harassed by abortion opponents, who will call them at work or at home to try to convince them not to have an abortion. Clinics providing abortions have been subject to bombing, arson, chemical attacks, and blockades in which hundreds of people will try to shut them down. Groups such as Operation Rescue and the Lambs of Christ - organized by and composed of fundamentalist Protestants or conservative Catholics - have chained themselves to medical equipment, poured glue into the locks of clinic doors, and strewn clinic parking lots with nails. Doctors and others who provide abortion-related services have been kidnapped, threatened, and picketed at home. Recently, another anti-choice organization, the Missionaries to the Preborn, has begun efforts to have one doctor and his wife, who works for a local Planned Parenthood, removed from their church. This group has interrupted church services, painted anti-abortion slogans on the exterior of the church, and have sent graphic pictures of allegedly aborted fetuses to other congregants. From 1977 to the present, Operation Rescue, which is gearing up to import its violent tactics to Europe and Australia, has been responsible for over 984 incidents of violence, 2,047 incidents of disruption, and 496 incidents of "blockading activity." In 1992 alone, arson and bombing incidents

caused nearly \$1.5 million in damage to clinics. There have been over 31,000 arrests as a result of Operation Rescue's activities. The election of a pro-choice president has caused these groups to call for greater efforts to stop abortion services; we believe that we will see increased violence against clinics and doctors who provide abortion and other reproductive health care services to women.

Finally, even though the "right" to abortion still exists in the United States, we face the bald fact that many women simply cannot obtain abortions. In addition to restrictions that bar women's access to the procedure - in particular, the lack of government funding - we face a severe shortage of providers in our country. 83% of the counties in the U.S. have no abortion provider; this figure is even higher in the rural areas of our country. In the state of North Dakota, for example, which is about the size of Austria & Hungary put together, there is only one clinic that provides abortion services. Many women travel hundreds of kilometres to obtain an abortion - which is hardest for poor women or young women, who already find it difficult to pay for the procedure. Many doctors are unwilling to perform abortions - in part because of the violence, in part because of the funding restrictions, and in part because of the stigma attached to abortion providers; at the same time, in all but three states, other health care practitioners, such as nurse-midwives, are not allowed to perform the procedure. Finally, all of these problems are being compounded by the lack of training required or even available to medical students and new doctors - as the doctors who have performed abortions since 1973, or even before, become older and retire, there are no new doctors to take their place.

Today, those of us working for reproductive rights in the United States - which include not only abortion, but the right to choose contraception, sterilization, and other reproductive health care procedures free from government coercion in either direction, as well as sex education, the prevention and treatment of sexually transmitted diseases, and pre- and post-natal care face two distinct and seemingly contradictory challenges.

First, we must continue to fight new restrictions on reproductive freedom, in whatever guise they may appear. This includes not only the more obvious efforts to restrict access to care, but also more indirect ways of promoting the notion that the fetus is a person. In recent years, for example, opponents of abortion have intruded into cases, similar to the recent one in Germany, involving pregnant women who are in persistent vegetative states and whose family members wish to terminate life support systems. These people - who know nothing about the women or families involved - have gone to court asking that they be named "guardians" for the fetus and given the opportunity to argue on the fetus's behalf. The "fetal rights" theory has also been used to force medical procedures on pregnant women. For example, in 1987, a 27 year-old woman named Angela Carder, who was 26 weeks pregnant and critically ill with cancer and pneumonia, was forced to undergo a cesarean section despite her own, her family's, and her

doctors' objections. Although it knew that the surgery might kill her, a court ordered the C-section for the sake of the fetus; both Angela and the fetus died following the surgery.² We have also seen an enormous increase in attempts to punish women for their behavior during pregnancy, usually behavior involving the use of drugs or alcohol. Although clearly unconstitutional - and, as public health experts agree, counter-productive and dangerous to the health of pregnant women and their children - hundreds of women have been arrested and criminally charged even though many tried to gain access to drug treatment and were turned away, often because of their pregnancy. Finally, using the excuse of "protecting" the fetus, some companies have adopted policies that bar fertile women of childbearing age from certain high-paying, unionized jobs. We must also address attempts to limit the type of information available to young people concerning sexuality and reproduction. Last year, members of the religious right conducted a number of "stealth campaigns" in local elections, in which they electioneered in local churches, rather than in more traditional public fora. Because they won a number of local offices, particularly on school boards, we expect to see a number of fear-based, religiously-biased sex education curricula introduced into our schools.

At the same time that we are fighting these and other restrictions, we must win back the rights we have lost over the last sixteen years and look forward to increased access to care. To do so, we will use as many different types of legal and public policy arguments as we can. Because of the Supreme Court's decision in *Roe*, the legal arguments surrounding abortion rights have centered on the concept of privacy. "However, we have never stopped making the full range of legal arguments concerning the invalidity of such laws, including, for example, the argument that these laws violate women's right to equality, for they are based on outdated and stereotyped views of women's "proper" role as childbearers and mothers. Indeed, in *Casey*, the Court specifically stated that choices relating to childbearing are "central to personal dignity and autonomy" and noted that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." We have also raised the issue of religious freedom, which is another fundamental right under our Constitution - for many of these laws are based on a particular religion's view of when human life begins. Sometimes, the religious bias can be very obvious, as when the Catholic Archbishop of Guam told that U.S. territory's legislators that anyone who voted against the abortion ban law would be excommunicated. In addition, we have argued that these laws violate the prohibition against involuntary servitude, for forcing women to continue unwanted pregnancies and carry to term surely constitutes forced labor in its most fundamental sense. And An appellate court later vacated this decision, finding that "a fetus cannot have rights . . . superior to those of a person who has already been born."

In cases where even speech about abortion is prohibited - such as in Guam, where the law had banned "soliciting" women to obtain abortions and where Janet

Benshoof, the president of my organization, was arrested for telling women that they could still obtain legal abortions in Hawaii - we have also raised free speech claims.

In addition to these more legal arguments, we must continue to highlight the medical, public health, and public policy reasons these laws should not be allowed to stand. Using data concerning the health consequences of unwanted continued pregnancy and illegal abortions, the safety of legal abortion procedures, and need for improved access to contraceptives, we have complemented the more purely legalistic arguments we make. By collaborating with researchers and doctors, we have shown that criminal abortion laws do not stop abortions - they cause more unsafe abortions; that criminal abortion laws are not imposed uniformly; and that strong family planning programs provide a more effective, more uniform, and safer means of reducing the number of abortions.

Finally, we must make arguments that touch not only people's minds, but also their hearts. Too often, in the abstract talk about rights, we have forgotten to put a face on the suffering of real women when faced with restrictions; when we take the time to explain the real life consequences of laws, we have found that we can change the public's perceptions about why these laws should not be allowed. For these reasons, it is absolutely critical that we take the time to attend events like this. By sharing information with other activists, scholars, lawyers, doctors, and the public - and by making links with not only the organizations in our own countries, but with organizations throughout the world - we can ensure that all women have access to the full range of necessary reproductive health care.

Italy/United States: Summary of the discussion

Machteld NIJSTEN (discussant)

I think both papers are very interesting and I will try to draw some comparisons. First I would like to say a few words on the Italian contribution.

Bioethical arguments. Advances in medical technology have led to a bioethical discussion not only in Italy, but in Europe in general. In Holland, for example there has been a long debate on what limits should be set on the many means of artificial insemination. The attention seems to have shifted away from abortion as an expression of the right to procreative freedom to artificial insemination as part of procreative freedom. One could say that the women who called for abortion freedom in the 1970s, are now claiming the right to have a child using the medical technology presently available. I wonder, though, to what extent this bioethical discussion really directly involves the abortion issue. If anything, the abortion procedure has been simplified over the years and requires less medical intervention than in the past. If the drug RU 486 will be used at a large scale, women won't need a doctor anymore. Only in the very few cases of late abortions, will the contribution of doctors and hospitals still be essential. Furthermore, in most European countries, including Italy, abortion rates have dropped over the last ten years, another reason for which abortion is receiving less attention. I would therefore say that, although this bioethical discussion certainly touches upon the abortion issue, it seems to be more directed to other medical interventions which require much more sophisticated techniques than abortion (genetic engineering, artificial insemination etc.)

Right to self-determination. Claudia Mancina proposes to base the right to abortion on the right to self-determination. Instead of treating mother and fetus as two separate individuals, she argues that the solution must take place "within the conscious subjectivity of the woman". I fully agree with her approach because I think that any decision must be based on this unity of mother and fetus. However, if we want to broaden the right to reproductive freedom and to include not only abortion but also artificial insemination, in-vitro fertilization, we run into problems with this unity between mother and embryo. In these cases, the interventions required are based on the separateness of mother and fetus. More thinking is required, to my view, in order to have a single theoretical and legal framework which deals with the right to reproductive freedom in the positive sense (i.e. to have a child) and in the negative sense (i.e. not to have a child) in an

integrated way. After all, abortion and childbearing are both reflections of the same right.

Attacks on the law. The Italian Abortion Act was passed in 1978 and I think it is fair to say that, despite some attacks on the law, abortion is no longer a social or a political issue in Italy. The Italian Abortion Act was definitely a compromise solution between the two opposing views, which is also reflected in the wording of the act. No ideological statements on women's rights are included, nothing like the statements by the US Supreme Court in *Roe v. Wade* in 1973. Nevertheless, the abortion rates have dropped and the law is applied, although with great regional variations. Its practical application can still be improved, but the law as a whole is no longer in question. I wonder therefore whether proposals to change the law, if not on minor points, have a great chance of success.

The United States: the comparison between Italy and the United States is very interesting because of the completely different pictures the two countries give. As we have heard from Ellen Goetz, after 20 years of litigation since *Roe v. Wade* was passed in 1973, abortion is still a highly divisive and polarized issue. The attacks continue on the abortion freedom declared by the US Supreme Court. This is very ironical, because for most European countries passing new abortion laws in the 1970s, *Roe* was the example. Europe looked at the US and in the parliamentary debates of some European countries specific references were made to this decision. Now, after 20 years, it turns out that the Italian law, which is definitely more moderate than the *Roe*-solution, is more effective and has led to a more liberal abortion practice than in the US, where the right to abortion was declared a constitutional right. At least that is what appears from the two papers this morning. This poses a number of questions.

1. Was *Roe v. Wade* too radical for its time? Did it set off this polarization because it was too early?

2. Are the reasons for this difference in outcome to be found in the difference between European and American culture? In the US a strict separation was made between the fundamental right to abortion and economic access to this right. The public funding of abortion was limited to a great extent because the fact that poor women can't afford an abortion was not considered as an infringement of the right to equal protection. In Italy, once abortion was legalized, it has never been questioned that abortion should be included in the National Health Service.

I have one last question concerning the American situation. One of the reasons, as I said before, that abortion is less of an issue nowadays in most European countries than in the seventies, is that the abortion rates have dropped. I would therefore like to know whether the same is true of the US. Have abortion rates dropped following liberalization of the law?

Ellen Goetz: The abortion rates have not substantially dropped. The reason is probably that there is no real access to the contraceptives and sexual education, which would lead to a drop in abortion.

My response to why the abortion issue is so polarized in the US is the following:

1. The very well organized and strong opposition of the anti-choice movement. They have mobilized themselves in a very impressive way.
2. Because the Supreme Court declared abortion was a constitutional right of the woman, a lot of feminists took it for granted that from now on there wouldn't be any problem and didn't keep up the struggle. This gave the opportunity to the anti-choice movement to bring the issue to the legislatures and the courts. Numerically speaking, the majority of Americans are pro-choice, but they weren't sufficiently involved in the political battles.

Marina Calloni: Although I know the political position of Claudia Mancina, I cannot fully explain what she has written in her paper. I would like to stress the particularity of the Italian debate. We are a Catholic country with a liberal law. The women's movement tries to respond to the attacks both of the Catholic Church and of the environmentalists. Claudia Mancina has tried to respond in her paper to the bioethical arguments voiced by people who present themselves as unreligious. She has asserted the right to self-determination of the woman on the one hand, and the rights of the embryo on the other hand. She is working especially on the theoretical basis of her arguments, in particular on the problem of personal identity, the moral status of the embryo, the conflicts between mother and fetus and the definition of *prima facie* rights. Claudia Mancina has developed an Italian version of the utilitarian debate taking place in the Anglo-Saxon world, among Feinberg and others.

Valeria Russo: I decided to collect for you the articles published in the Italian press during the last ten days, from the moment when the Pope stated that women in Bosnia do not have the right to abortion. *Controparola*, a political action group, has proposed not to use the possibility of giving 8 per mille of one's income tax to the Catholic Church.

Monika Frommel: I think it is very dangerous to speak in terms of rights. Once a right to life of the fetus has been recognized, it is very difficult to allow abortion, because the right to life is always an absolute right.

Ursula Barry: It is very difficult not to speak in terms of rights in Ireland, a referendum has led to a constitutional amendment which entrenches the right to life of the unborn.

Wanda Nowicka: Also in Poland, the right to life of the fetus has been stated in the Constitution.

Karen Lippold: We don't set the debate. We have to respond to people who speak in terms of rights, right to life etc. In Canada an effort has been made not to take the terminology of the other side, that means not to use the term pro-life, but to speak of anti-choice. By using the terminology of the other side, we might end up

propagating their values. I think this is an example to be followed. However, courts have to deal with the arguments in terms of rights. In Canada, for example, men have gone to court to claim their rights as fathers.

Jennifer Welsh: I would like to reiterate the difference between Europe and the United States. My experience with Eastern Europe is that they are going back to first principles - how to draft constitutions. I hope that there is a European culture that is going to influence the American/Canadian obsession with rights. A second point I wanted to make is that in North America abortion is a political issue and women's political careers depend on their stand on abortion. I was wondering whether the same is happening in Eastern Europe.

Wanda NOWICKA: There are not many women involved in politics in Poland. So there is not that kind of phenomenon. There are politicians - mostly men - who recently started to identify themselves with the abortion issue. But this is a very recent phenomenon, because up to November of last year, politicians were very scared to pronounce their views on this issue. Women are not 'frontrunners' in this respect.

Olwen Hufton: The more one listens, the more one comes back to the language of rights, universal rights. But there is no universal standard to which one can appeal. The fact that the European Community was constructed on the respect of the constitutional rights of the individual contracting parties, makes it almost impossible, for example in the Irish situation, to go forward. The British example of the pro-life movement trying to assert the rights of the father, had a manifestation which verged on the farcicle. In 1986 an Oxford undergraduates claimed his rights as a father, which delayed the time in which the woman involved could have an abortion. I have never participated in anything in which the right to fatherhood was so decried. In this case, the courts acted very positively and the pro-life movement was cut off at a very early stage. I do want to stress the language of rights because I think it is something we should be talking about.

Hege Braekhus: I just want to react to Monika's statement that one should not define life. The question really is whether the fetus is a person. That's what the discussion is about.

Monika Frommel: Human life and human being are not legal terms. The term 'individual person' is a moral category. Once one admits that something is a person, one has to grant it the right to life, which is an absolute right and it will be very difficult to allow for abortion. At the moment we have a relatively open situation. After this discussion, I am not so sure whether in Europe we should embark upon a pro-choice strategy in the American way. The cultural context in Europe is so different that I fear it would be better to think about other solutions.

Sally Sheldon: It would be very interesting to hear something about the Italian reform proposals, this package of restrictive measures introduced by two Christian Democrats. What chance of success do they have?

Marina Calloni: Casini and another woman introduced these proposals to the Parliament just before the Pope pronounced himself against abortion for the raped Bosnian women.

Abortion in Ireland - A Breach in the Consensus¹¹

Ursula BARRY

There is a power struggle taking place in Irish society today. It is fundamentally about the status of women within the legal and institutional framework of contemporary Ireland. While the status of men in Ireland has always been taken for granted, the legal position of Irish women has been the subject of definition and redefinition throughout the history of the State. Irish women are constantly told that our needs must be subordinate to the "collective good". The problem is that the common good has been constructed on the basis of the exclusion or secondary status of Irish women.

But more than anything, it has been the struggle for reproductive rights which has reflected this wider confrontation over the very status of Irish women and the nature of the society we live in. Issues of fertility control have convulsed Irish society for over twenty years and continue to create intense recurrent crises.

The 'X Case' in early 1992 put the abortion issue, not for the first time, right onto the centre stage of Irish politics. This case involved a 14 year old rape victim who was prevented by a High Court injunction from travelling to England for abortion. While this injunction was eventually lifted by the Supreme Court, on the basis that the young girl was suicidal, the horrifying consequences of a 1983 Constitutional Amendment on foetal rights, had become devastatingly clear. The struggle over women's reproductive freedom reached a new intensity. Access to abortion information, rights to freedom of movement, bodily integrity and the unfettered provision of comprehensive reproductive health services for Irish women once again became pivotal points on the Irish political landscape. That the struggle over reproductive rights reflects the contradictions and the tensions at the very heart of the Irish social and cultural system was confirmed by the experience of the past year.

What is at stake in this power struggle over women's reproductive freedom, with abortion at its centre? It is the right of the State and its institutions to compel a woman to carry a pregnancy to term against her will; to force her to bring her

¹¹ © Ursula Barry.

pregnancy to term despite damage to her health of the most serious kind; to force her to bring her pregnancy to term when she is yet a child; to force her to bring her pregnancy to term even when she has been abused and violated; to force her to bring her pregnancy to term despite her personal, private and family decisions. The laws, the Constitution, the health service, the medical system, the political parties, the courts and the judiciary have all been recruited to the cause of compulsory pregnancy in Ireland.

Historical Context

Historically, attitudes to reproduction in Irish society have been bound up with our experience of famine, disease and emigration. The historical tradition of the large family has as much been a strategy for economic survival, in a society with high levels of infant mortality, as an ideological position drawn from catholic thinking. Reproduction as an economic imperative has a powerful and deep-rooted place in the collective cultural memory.

It is in this context that we must analyse the movement for reproductive freedom for over two decades has struggled to achieve a measure of progressive reform. For that struggle for reproductive freedom tears at the very heart of the tensions inside this State - not least because it concerns the fundamental position of women.

1980 marked a turning point in the Irish Republic in the debate over reproductive rights. It was the year when contraception was finally legalised, albeit in a restricted form. Women's organisations had been at the forefront in successive campaigns for full legalisation through the 1970's. The new Act was a highly restrictive and unworkable piece of legislation: to get contraceptives, you were supposed to be married and to have a medical prescription. Ironically, family planning clinics had been defying the law right through the seventies. They had managed to exploit a loophole in the law (highlighted by a Constitutional case in 1973) allowing contraceptives for "personal use" but prohibiting their importation, sale and promotion.

Despite the restrictive nature of the new legislation, right-wing forces within the State interpreted the change as a major and ominous defeat. It represented the first real break, in the area of social legislation, between the laws of the State and the teachings of the Catholic Church. Whereas in other countries, the Catholic Church had been forced to accept new and changing social realities, in the Irish Republic they stubbornly maintained the most rigid positions on 'mixed religion' marriages, contraception, divorce, abortion and sexuality. In the process, they spawned a myriad of right-wing, fundamentalist-style catholic organisations. They are its front line. Family Solidarity, the Responsible Society, the Society for the Protection of the Unborn Child (SPUC) and others are the new face of catholicism.

Alliances have been formed with older, more established organisations of the right, such as Opus Dei and the Knights of Columbanus. All these organisations share an obsession and a fear of human sexuality: they oppose divorce, sterilisation, contraception, abortion and homosexuality.

The defeat over contraception spurred on the right to forge a new and openly campaigning alliance, with abortion as their chosen issue. A new organisation was launched, the Pro-Life Amendment Campaign (PLAC), which acted as an umbrella organisation for various individuals and groups. The aim of PLAC was to campaign for an amendment to the Constitution, by way of a referendum, asserting the 'right to life of the unborn'. At this time abortion was already illegal in the Irish Republic under the 1861 Offences Against the Person Act, a nineteenth century piece of British legislation which had been carried through into the newly-established Irish Free State (which later became the Republic) following political independence in 1922.

This Act made a woman having an "unlawful miscarriage" or anyone assisting her to procure one, subject to a penalty of life imprisonment. No court case had ever been taken in Ireland to establish the scope of the term "unlawful miscarriage" - it was simply assumed to outlaw all abortions except those involving the removal of a pregnant woman's diseased organ (such as the womb, fallopian tube).

PLAC was campaigning for an amendment to the Constitution which would have the effect of preventing the enactment of any future legislation dealing with abortion, without a national referendum. The fact that abortion is already illegal within the Irish State has meant that Irish women who choose to terminate a pregnancy, for the most part, do so in England. Official figures show that over 5,000 Irish women go to England every year to have an abortion. The number of Irish women going to England for abortion has risen steadily since the passing of the 1967 Abortion Act in Britain. These figures represent only those women who give Irish addresses.

PLAC emerged as the most powerful campaigning group in recent Irish history. Within a matter of months they had secured the commitment of the two major political parties to the holding of a referendum to amend the Constitution. No other campaigning force, despite drawing enormous numbers of supporters and high levels of organisation, has managed to shift the Irish political system so rapidly. PLAC was openly supported by most sections of the Catholic Church, whose infrastructure was intensively used during their campaign. Their campaign used the most sophisticated public relations techniques and was clearly VERY well funded.

For nearly two years, between 1981 and 1983, the battle raged between PLAC and the Anti Amendment Campaign (AAC), an alliance of feminists, left wing and progressive forces. The amendment issue dominated newspapers and television and acted as one of the most divisive issues in recent Irish politics. Professional

associations, cultural organisations, community associations, women's groups and political parties were all forced to state their position, amid an atmosphere of increasing tension and 'moral blackmail'. The medical and legal professions split down the middle with doctors' and lawyers' groups forming for and against the amendment. Those who came out against the amendment were labelled 'murderers' and 'sluts'. Insidious political literature was distributed to garner forces by stealth against individual politicians who joined the AAC. Not one of the mainstream political parties argued in favour of a 'woman's right to choose' although the Labour Party and sections of Fine Gael (Christian Democratic Party) argued that the amendment was unnecessary as abortion was already illegal.

The outcome of the referendum produced a 2:1 vote in favour of the amendment. Just over half of the eligible electorate voted. The strongest vote against the amendment came in urban mainly middle-class areas. The actual wording of the amendment which now forms part of the Irish Constitution reads as follows:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees to respect, and as far as practicable, by its laws to vindicate that right." 8th Amendment to the Irish Constitution, September 1983.

One of the most interesting aspects of this amendment is the wording itself. The ideology which shaped this amendment draws little on traditional Irish catholicism. It is, in fact, the influence of American 'pro-life' movement and particularly its ideology of foetal rights which provides the framework for this amendment. The rhetoric of rights is not one which is rooted in the prescriptive style catholicism which has been imposed on Irish people. Rather Irish social history is littered with examples of bitter conflicts over questions of rights and the role of the State. As late as 1951, the catholic church opposed a welfare scheme for pregnant women and new born infants, on the basis that the State should not interfere in family welfare.

Yet, in this amendment we have right-wing catholicism formulating a constitutional amendment asserting foetal rights and looking to the State to 'vindicate' those rights. In effect the battle to amend the Irish Constitution is an Integral part of an international movement to undermine gains made by the women's movement in the sixties and seventies. The right's victory in the referendum meant that the Republic of Ireland became the first country to enshrine the 'right to life' of the foetus into law - a victory being used to strengthen and consolidate its ground in many other countries.

The Unacceptable Nature of Eighth Amendment

The consequences for Irish women have been severe. This amendment puts the

right to life of a pregnant women on equal terms with that of the foetus she is carrying. Without a doubt, this is a radical redefinition of woman under the law: Irish women have been recategorised to be equal to that which is not yet born. The legal ramifications of such a situation are immense. What happens in a case where a conflict between the life of a pregnant woman and her foetus develops?

The bodily integrity, health and personal freedom of Irish women can never be guaranteed as long as their rights are equated with those of the foetus. The Amendment also gives a mandate to the State to actively interfere in the lives of women to "protect" the foetus irrespective of any decision of the woman about her own health, welfare and responsibilities. By establishing this constitutional equality between a pregnant woman and the foetus she is carrying, the basic rights and status of all Irish women have been diminished. Critical health and intimate personal decisions which should be made by pregnant woman themselves are legally subject to rights of the foetus from the moment of conception. A pregnant woman in Ireland is no longer an autonomous human being but an object of regulation, restriction and, if necessary, repression.

With the passage of this amendment into law, the right in Ireland were by no means content to 'rest on their laurels'. Within two years, the Society for the Protection of the Unborn Child (SPUC), one of the key member groups of PLAC, had issued civil proceedings against women's clinics who were offering a non-directive pregnancy counselling service to Irish women. These clinics (Open Line Counselling and Well Women Centre) were the only agencies providing information on all the options facing women with unplanned pregnancies, including abortion (involving travelling to England). SPUC alleged that the clinics were acting in breach of the 8th Amendment to the Constitution. On 19 December 1986, Mr Justice Liam Hamilton, President of the High Court granted SPUC an injunction against the pregnancy counselling services. Open Line Counselling were forced to close down and Dublin Well Woman Centre have suspended their counselling services. Although this ruling was subsequently successfully appealed to the European Court of Human Rights in May 1992, the Court injunctions against the clinics remain to this day.

The implications of the Hamilton Judgement stunned the Women's Movement and other democratic organisations within Ireland. Effectively, information and advice concerning abortion facilities in Britain or elsewhere could no longer be publicly made available to women in the Irish State. Justice Hamilton argued that the 'right to life of the unborn' is a more fundamental right than the 'right to information'.

Emergency underground counselling phone lines were established by feminists, operating in a fragile financial and legal climate, while in England the Irish Women's Abortion Support Group has been providing invaluable support to women arriving to avail themselves of abortion facilities. One of the consequences of this

situation is that many Irish women who decide on abortion have been forced to waste critical time securing the information and advice they need.

The censoring of abortion information and restrictions on non-directive pregnancy counselling have created a climate of fear in the Irish State. Women who make the choice of travelling to Britain for abortions do so uninformed, without support and in a state of heightened distress. Many women travel either too early to have an abortion or else unnecessarily late-on in pregnancy. The majority arrive without counselling, unaware of what to expect and without having had the full opportunity to explore all the options. Because such secrecy and terror surrounds women travelling for abortion, many carry out the journey in an extremely short period of time and avoid post-abortion counselling and check-ups in order to maintain that secrecy. And for many women on low incomes, travelling to England to a private clinic is simply not an option at all.

Censoring abortion information meant the repression of those distributing that information. In addition to the counselling services, fourteen student representatives have faced systematic court action to prevent them making available the names and addresses of abortion clinics in Britain. Despite the fact that British telephone directories, for example, and a variety of other sources regularly publish such names and addresses, the court cases continue. The injunctions against named pregnancy counselling services and the fourteen named students are still in place, and major court costs have been awarded against the students. Censoring of abortion information has also led to the removal of The Guardian newspaper from circulation, on a day it carried an advertisement for a clinic in England, the blocking out of the back pages of Cosmopolitan magazine, the removal of a supplement on vaginal health from Company magazine, the taking off the shelves of women's health publications in public libraries and the restriction of coverage of the abortion issue on radio and television. Abortion information continues to circulate, but it has been criminalised and driven underground. Only the determination and commitment of small groups of people have maintained the channel of information to Irish women.

The "X" Case

This climate of fear and repression was temporarily shattered in January 1992 when an injunction was taken out against a fourteen year old girl and her parents, preventing her going to England for an abortion. The "X" Case shocked and rattled the social fabric of the State - Irish society found itself once more convulsed and engulfed in controversy over abortion. The emotional and political responses of the bulk of Irish people were expressed in an overwhelming desire to have the injunction lifted and the issues sorted out and resolved. Demonstrations, delegations, public meetings, televisions, radio and newspapers were inundated with individuals and organisations protesting against the "internment" of the 14

year old girl.

The best aspects of that response opened up an aching need for Irish society to come to terms with the circumstances individual women and girls find themselves in and to develop a compassionate and caring society where all options could be exercised in circumstances of unwanted pregnancy. People were genuinely outraged that the girl could be held against her will; that the courts and the judiciary would be used against a child pregnant as a result of rape and abuse.

The "X" Case challenged many aspects of Irish society, but in particular it challenged the "hidden" Ireland where social realities are buried, ignored and rendered invisible for the "greater good" of society as a whole. And more often than not those social realities are about women and the place women hold in this social system - they are about violence, poverty, appalling housing, rape, broken families, sexual abuse - the underbelly of a society intent on preserving its complacent and self-satisfied exterior.

Some weeks later, the case was successfully appealed to the Supreme Court who lifted the injunction on the grounds that the young girl was suicidal. The Supreme Court took the view that abortion is permitted under the Constitution where there is a real and substantial threat to the life of a pregnant woman. This was a clear recognition by the highest court in this State that a total ban on abortion puts the lives of women at risk. It also showed that in very particular circumstances, where the equal rights of a pregnant woman and her foetus are in conflict, the constitutional balance may favour the pregnant woman. This was a huge victory for the massive mobilisation that took place in the wake of the original court hearing but it has yet to be translated into statute law, and abortions are not carried out in Ireland even in cases of a threat to the life of a pregnant woman.

And the judgement itself was doublesided. While asserting the right to abortion in life-threatening circumstances, the courts also affirmed the State's right to prohibit Irish women travelling for abortion and to restrict access to abortion information in other circumstances (i.e. non life-threatening). Nobody knows what will happen in future cases. In the "X" case they deemed that there was a sufficient threat to the girl's life. What happens the next time such a case comes before the court? How will the rights and conflicts be weighed? The blanket ban on abortion in Ireland creates life-threatening situations in this society every year. Only our proximity to legal abortion services in Britain has eased the pressure of this intolerable position. What kind of debate would be taking place in Ireland if the English option were not available to so many Irish women?

Shifting Attitudes

While the various courts were making their deliberations, successive opinion polls

were showing that Irish peoples' attitudes to abortion were changing. Survey results indicated that the vast majority of Irish people (between 70 and 85%) now believed that abortion should be available where there is a threat to the health of a pregnant woman while around two-thirds of the adult population were consistently shown to favour the availability of abortion in cases of rape and incest. The overwhelming sympathy and support shown for the young girl held in this State against her will and against the wishes of her family were rapidly translating into a desire for legal reform - for laws capable of responding to such circumstances of urgent and desperate need.

In February 1992, within weeks of the "X" Case, an Irish Marketing Surveys Opinion Poll was published in the Sunday Independent: 66% of those surveyed stated that the 8th Amendment should be revised to allow for abortion in "certain limited and clearly defined circumstances", (67% men and 65% women).

In May 1992, an Opinion Poll carried out by the Market Research Bureau of Ireland was published in the Irish Times: 80% of those surveyed stated that abortion should be available in limited circumstances, 19% said abortion should not be allowed in any circumstances. (Of the 80% in favour of availability - 16% favoured availability for anyone who wants it, 46% favoured availability in case of rape, incest & other special circumstances and 18% favoured availability only when the woman's life is threatened).

A Market Research Bureau of Ireland poll published in the Irish Times on November 13th showed that 73% believe abortion should be legal in certain circumstances, 20% believe abortion should be illegal in all circumstances and 7% were undecided. When asked about the circumstances for legalisation, 19% believed abortion should be available to anyone who wants it and 54% believed abortion should be available where a pregnant woman's life is at risk.

The anti-abortion consensus in Ireland had been breached. That dominant ideology which asserted that the great majority of Irish people are opposed to abortion in all circumstances was, and continues to be, in crisis. All the evidence points to the conclusion that the fundamentalist-style anti-abortion position no longer holds sway in the Ireland of the 1990's. Irish people as a whole have separated themselves finally and irrevocably from the absolutist, unbending and anti-woman sentiments of anti-abortion groups and individuals. This represents an historic turning point for Irish women. Irish society is showing a greater willingness to confront the reality of women's lives - part of a wider change taking place reflected in the legalisation and widespread use of contraception, the increased recognition of sexual abuse and violence and the election of Mary Robinson as President of Ireland.

This rupturing of the anti-abortion consensus was confirmed in November 1992 when a three clause referendum was held in an attempt to clear up the legal mess

(concerning travel and information rights) arising from the "X" Case. A strong majority asserted Irish women's right to travel and to access abortion information. In a third vote (conceded to the anti-abortion movement), Irish people rejected a proposal to overturn the court judgment on abortion rights in life threatening situations. This reinforced a critical defeat for the anti-abortion organisations in Ireland.

An Important and Decisive Victory for Women

The overwhelming endorsement of the right of women to travel and to abortion information represented a clear and decisive rejection of the perspective put forward by anti-abortion organisations in Ireland. A developing awareness of the scale and the nature of crises pregnancies has led the majority of Irish people to the conclusion that a blanket prohibition on abortion is both inappropriate and unacceptable.

A fundamental shift in the attitudes of the people in this country to abortion has occurred over the past decade. Since 1983, the legal harassment of women's health services, the dragging of students through the courts, the interference with publications containing abortion information and the pursuit of a young girl through the courts by the primary legal officer of the State have all highlighted the dangerous and unacceptable nature of Constitutional amendments on abortion. The response to the "X" Case in particular showed so dramatically that Irish people have no stomach for such a brutal use of the Constitution and desperately want the legal framework of this State to be capable of responding to individual women in circumstances of need and anguish.

There are profound changes taking place at this time among the women of Ireland. In this past year, Irish women have been forced to confront not just a specific piece of discriminatory legislation or a particularly offensive social practice, but rather the fundamental attitudes towards women that have shaped and continue to mould the society we live in. For many women, the idea that our freedom of movement could be interfered with by the State has been a deeply shocking experience. And that shock has been compounded by the way in which it was treated within the political system. The political manoeuvring of the last year highlighted the low priority given to the fundamental status of women by the majority of the political parties, the legal and judicial system, the trade unions and the entire European process generated a new realisation among women that we must rely on ourselves. Irish women have lost much confidence that our rights and freedoms are of real concern within the Irish political process and unless some radical changes take place, women will become further disaffected from parties, organisations and individuals who purport to represent us and our interests.

For abortion rights in Ireland are still determined by the Eighth Amendment to

the Constitution. While this Amendment has been interpreted to permit abortion in certain very particular circumstances (i.e. when the physical life of a woman is under threat), that same Amendment means that legislation cannot be introduced which permits abortion even in cases of rape, incest, severe deformity of the foetus or many debilitating medical conditions. Unless that Amendment is removed from the Constitution, further liberalisation of the law is virtually impossible. Changing attitudes are the key to long-term change, but the experience of the process of social reform in Ireland, would indicate that legal reform will take a long time to reflect those new attitudes.

In the meantime, the Eighth Amendment to the Irish Constitution radically diminishes the legal definition of women in Irish society by placing a pregnant woman in a position of equal legal status with that of the foetus she carries. This is an irreconcilable contradiction and one which in the long-term Irish women will refuse to accept. Consequently, reproductive freedom for Irish women will continue to reappear on the political agenda, demanding a resolution which reestablishes the full legal standing of Irish women.

Abortion in Switzerland - a Law More and More Disregarded¹²

Anne Marie REY

Current legislation

Abortion in Switzerland is ruled by articles 118 to 121 of the penal code which came into force in 1942. Abortion is forbidden with the sole exception of therapeutic termination of pregnancy on medical grounds. Execution of the law (the administrative procedure and jurisdiction) lies with the 26 cantons.

Art. 118 stipulates that a woman who herself induces an abortion or has it induced will be subject to imprisonment, for a period of between three days and three years. Conditional sentences are also possible. The same applies to a person (other than the abortionist himself) who helps the woman. After a lapse of two years the act can no longer be prosecuted. Curiously this prescription period is much shorter than with other criminal acts, where it normally is five years. According to several sentences of the Federal Court - passed in the early years of enforcement of the law - an unsuccessful attempt, even with unsuitable means, or an attempted abortion upon a woman who was not actually pregnant are also punishable. Art. 119 stipulates that any person performing an abortion on a consenting woman will be sentenced to imprisonment for up to five years.

When an abortion is done on a woman without her consent, the sentence will be one of imprisonment for up to ten years. It will be a period of at least three years when the abortionist makes a business out of abortion.

Art. 120 defines legal termination of pregnancy: A pregnancy may be terminated by a medical doctor, with the woman's written consent, in order to avoid a danger to her life or a serious danger which is not avoidable by other means of severe and lasting injury to her health. Before performing the abortion, the doctor must obtain the written consenting opinion of a second doctor who is a specialist in the condition of the pregnant woman. This second doctor must be designated by the authorities of the canton where the woman lives or where the abortion will be performed. The cantonal authorities may designate in a general way the

¹² © Anne Marie Rey.

specialists authorized to give the second opinion or name a specialist on request, in each particular case. If the woman is not capable of discernment, the written consent of her legal representative is required. In case of emergency, the abortion may be performed without a consenting second opinion. In this case, the doctor has to notify the cantonal authority within 24 hours. In any other case of severe distress to the woman, the judge may alleviate the sentence. Art. 121 stipulates that a doctor who omits to notify the authorities in the case of an emergency termination of pregnancy may be imprisoned for up to three months or fined.

This sounds like a very restrictive law. Still it is worth noting that it neither fixes any time limit for therapeutic termination of pregnancy, nor requests parental consent for minors. Discernment is defined in the Swiss civil code as the capability of acting reasonably, which may be impaired by a child's young age. A 16 year old girl would be considered able to make her own decision. The law does not say anything about the beginning of pregnancy. But in practice it is deemed to start with implantation. Neither does the law require compulsory counselling or a mandatory waiting period before the operation can take place.

Eugenic (fetal) grounds and criminal (rape, incest etc.) grounds are considered to fall under the medical indications for termination of pregnancy.

The History of the Law

The Swiss abortion law is the oldest in Europe. Before its enactment in 1942, abortion was regulated by cantonal penal codes, which all prohibited abortion, except in cases of strict medical necessity. Enactment was preceded by 50 years of discussion. In the draft penal code of 1916 - following pressure from medical organizations - medical grounds for legal termination of pregnancy were explicitly mentioned for the first time. The wording was less restrictive than in the law of today! It was only in the course of the parliamentary deliberations which started in 1921, that the requirement of a written consenting opinion was introduced, as a concession to the Catholic Conservatives who threatened to oppose the whole of the penal code if abortion were to be made legal. Abortion was, together with the death penalty, the most hotly discussed issue both in Parliament and in the campaign preceding the referendum of 1938, when the Swiss penal code was adopted by a narrow majority.

The aim of the new Swiss penal code to unify and clarify the law, has not yet been achieved in so far as abortion is concerned. The law left a wide range of possible interpretations open to doctors (especially after the World Health Organization defined "health" as being a state of complete physical, mental and social well-being), and cantons were free to designate as many doctors as they wished to give the second opinion.

Medical practice in some urban and protestant cantons such as Zürich and Geneva, had become increasingly liberal with regard to termination of pregnancy, even before the Swiss penal code entered into effect. After 1942, this liberalization process continued, to the effect that the number of legal terminations rose sharply in these cantons, replacing formerly illegal abortions. Moreover, foreign women, especially from France, came to Switzerland in growing numbers to have an abortion. Geneva became a well known abortion center. For approximately three decades (1950 to 1980) there were more legal terminations of pregnancy than live births in this canton. But other cantons like Vaud (with the city of Lausanne), Neuchtel, Berne, Basel-City and Zürich also soon became known for their liberal interpretation of the law.

In the late sixties progressive medical doctors and the newly formed women's liberation movement started discussing the liberalization of abortion.

A scandal with three doctors being involved in large numbers of illegal abortions in the canton of Neuchtel led to the adoption of a proposal, by the cantonal Parliament, asking for the abolition of art. 118-121 of the Penal code. In 1971, this proposal was addressed to the federal Parliament. Three of the authors of this proposal, joined by two persons from the canton of Berne then formed a committee which launched a federal initiative with the same aim. The initiative was firmly supported by the women's lib and the necessary 50,000 signatures were collected in a few months. But it had no support in Parliament. Instead a proposal to legalize termination of pregnancy at the request of the woman within the first 12 weeks of pregnancy only narrowly missed gaining a majority in the Lower House (the National Council). Therefore in 1975, the group launched a new initiative asking precisely for this. The first initiative was withdrawn.

In 1977 the initiative for abortion on request in the first 12 weeks of pregnancy was put to the ballot. It was supported by a broad range of women's organizations, trade unions and political parties. While the right wing parties were divided on the question, only the confessionally bound (Catholic and protestant) parties were clearly against it. The Catholic Church and organizations near to it took a very strong stance against the initiative, whereas in the protestant Church there were differing opinions.

The main medical organizations either remained silent or took some distance. Among gynaecologists, in 1972, 22% favoured abortion on request. 58% would have accepted social grounds for termination of pregnancy. Psychiatrists were a little more favourable, with 38% approving of abortion on request.

The initiative only narrowly missed the majority of the votes in September 1977, with 48.3% of voters accepting it in the ballot. But only in 7 out of the 25 cantons did the initiative reach a majority in its favour. (A constitutional amendment, to be adopted, needs both the majority of the votes and a majority of accepting

cantons). All the small catholic cantons voted against. The result of the ballot varied greatly between cantons, with Geneva at one extreme (78,7% accepting votes) and Appenzell Inner Rhodes in Central Switzerland at the other (7,4% accepting votes).

In 1978, a Bill that would have legalized abortion for social reasons, was dismissed by the electorate with 69% of the votes. The procedure to be followed by the woman in order to obtain an abortion would have been so complicated according to this Bill, that progressive forces joined with reactionaries to combat it.

In 1979 the anti-abortion movement in their turn launched an initiative asking for the protection of human life from conception to "natural death". Again there was a long and heated public debate. The initiative was heavily defeated in the ballot in 1985, with 69% of the electorate voting against. As had been the case in 1977, the results differed greatly from one region to the other.

All of these debates which lasted for more than 15 years, left the Penal code unchanged. They led only to the passing of two laws by Parliament in 1981: one obliging the cantons to create counselling services for pregnant women, the other stipulating that health insurance has to reimburse the costs for legal abortion without exceptions.

Abortion in practice

The reason why I have dealt at some length on this historical part is that it has greatly influenced today's practice of abortion. An ever growing cleavage between the law and practice is visible. Because cantons are authorized to designate the doctors allowed to give the second opinion prescribed by art. 120 of the Penal code, and because the wording of the law leaves quite a large space for interpretation, practice has been evolving differently from one canton to the other.

Six cantons (Basel-City, Berne, Geneva, Neuchtel, Vaud and Zürich) have a longstanding record of a very liberal application of the law. They authorize quite a large number of doctors to give the second opinion, and the woman or her doctor are allowed to choose freely among them. Since 1980, in the canton of Berne for instance any specialist doctor in free practice may give the second opinion. In the canton of Zürich all psychiatrists are allowed to do so. A more and more liberal interpretation of the law was tolerated in these six cantons, so that psycho-social grounds for abortion are now broadly accepted, and account for over 90% of terminations of pregnancy. The second opinion has become almost a mere formality.

Over the last 20 years, some more cantons have joined the category of liberal cantons: Aargau, Basel-Country, Ticino. Glaris, Jura and Soleure are also moving

in this direction¹³. In these cantons almost any woman really wanting to terminate her pregnancy will be able to obtain the operation legally. Very seldom will her request be turned down.

In other parts of Switzerland practice is also changing to become more liberal. Some cantons which counted among the restrictive ones 20 years ago, now take an intermediate position. Of late some terminations of pregnancy are possible even the very Catholic canton of Valais.

On the other hand, there still remain a few small Catholic cantons in Central Switzerland, where no legal abortions are possible at all.

This inequality leads to what is called abortion tourism: women from restrictive cantons will travel to more liberal places to have their unwanted pregnancy terminated. According to a sentence of the Federal Court, cantons are not allowed to restrict abortion to residents. This tourism has become less, over the years, but is still going on. Whereas in 1970, 98% of legal abortions were done in 6 liberal cantons where 53% of the total Swiss population live, in 1990 92% of abortions were done in 9 liberal cantons where 65% of the population live.

Great differences exist not only in the interpretation of the law, but also in the way terminations of pregnancy are carried out. In a few liberal cantons, relatively large proportions of terminations are done by doctors (not only gynaecologists, but also general practitioners) in their private offices or in private clinics, often under local anaesthesia and on an outpatient basis. In other cantons, terminations are mainly or exclusively done in public hospitals, generally under general anaesthesia, with a hospitalization of two, three or even more days. In some hospitals, prostaglandins are routinely administered to soften the cervix, in the evening of the day before aspiration takes place¹⁴. All this is not a question of laws or of cantonal regulations (the law, according to a verdict of the Federal Court, does not allow supplementary cantonal regulations in this field), but depends on hospital rules or the opinion prevailing in the medical establishment in question. In some cantons women have to go to a psychiatric hospital to obtain the second opinion. And of course, how women will be treated when asking for an

¹³ ASDAC: "Interruption de grossesse en Suisse: Loi, pratiques et prévention" (German version: Schwangerschaftsabbruch in der Schweiz: Gesetz, Praxis und Prävention). Lausanne, 1990. Dondénaz, Martine et al.: "Interruption de grossesse en Suisse: chiffres de 1982 à 1986". *Méd. et Hyg.*, 47, 1989. Dondénaz, Martine et al.: "L'interruption de grossesse en Suisse: période 1987-1990". *Méd. et Hyg.*, 50, 926-934, 1992. Stamm, Heinr. et al.: "Schwangerschaftsabbruch in der Schweiz 1982 bis 1986". *PRAXIS*, 79, Nr.9, 1990.

¹⁴ Gaillard, Ursula et al.: "Retard de règles". Ed.d'en bas, 1983.

abortion, depends largely upon how sympathetic her doctor will be.

The fact that abortion is still forbidden in principle by the Penal code, makes women feel criminalized and guilty. And many doctors feel they are acting in a sort of grey zone. As a consequence, abortion is still very much taboo. Moreover, having to travel - maybe several times - to another canton to get an abortion, causes additional stress to the women and may delay the intervention for 2 to 3 weeks.

The Incidence of Abortion

As it is, almost any woman who really wants one can get an abortion in Switzerland today. Maybe not in the canton where she lives and maybe with more or less red tape and humiliation. But she can get it. At least if she is not more than 12 weeks pregnant. Late abortions are much more difficult to obtain, although the law does not fix any time limit.

Although access to abortion has become much easier over the last 20 years, the numbers have been falling. The decline has been dramatic as far as clandestine abortions are concerned.

Illegal abortions were estimated at about 20,000 to 60,000 in 1966, and at 20,000 to 40,000 in 1970. Today one may assume a very low incidence of illegal abortions, most of them done by doctors without obtaining the second opinion required by law. It seems very unlikely that any illegal abortions are done nowadays by backstreet abortionists: women are no longer seen in hospital as a result of botched abortions, and since 1973 there has been no death due to abortion.

After the enactment of the Penal code in 1942, the number of convictions rose sharply and attained an absolute maximum in 1950, with 667 convictions. Growing tolerance made this figure fall to a yearly average of about 380 in the early sixties. In the late sixties the number had fallen still further to 150, presumably because legal abortions had replaced clandestine abortions and because contraception had become generally available. After the launching of the initiative for decriminalization of abortion in 1971, broad public discussions made the number crumble down to a few convictions per year. Since 1980 there have been only four convictions (one each in 1982 and 1988, two in 1986). Since then there have been no prosecutions.

In the late sixties and early seventies, thousands of Swiss women needed to travel abroad (to Yugoslavia, Italy, England and the Netherlands) to have their pregnancies terminated. Today this number has certainly decreased greatly because there is no longer any need to travel abroad, except in the case of terminations at a later stage of pregnancy, when the operation is difficult to obtain

in Switzerland.

The number of legal abortions rose sharply after the enactment of the Penal code. In 1966 and again in 1970, it was estimated at about 22,000 (compared to about 100,000 live births)¹⁵. This figure can only be estimated because not all the cantons collect statistics. It began to fall, when the countries neighbouring Switzerland introduced abortion on request in the seventies. The number of residents having terminations is also estimated to have slowly diminished since 1980, when it was 17,800, to about 13,000 in 1990. The number of live births was 84,000 in 1990. In 1990, the abortion rate was estimated to be about 8.7/1000 women of age 15-44. The abortion ratio was approximately 15.8/100 live births.

The dramatic decline of the total incidence of abortion by 50 to 80% is certainly attributable mainly to the introduction, in the late sixties, of modern contraceptives, to the creation of family planning centers and the progress of sex education in schools. Contraception has largely replaced abortion, and illegal abortion has been replaced by medical termination of pregnancy.

Let me just say a few words about the demographic characteristics of women having abortions in Switzerland. There are no very sophisticated statistics about abortion in my country. The most detailed information is available from the canton of Bern. Figures for 1990 from this canton show that 40% of the women seeking abortion were married, 50% were single. 54% of the women had no child, 8% had three or more children. 66% were residents of Swiss nationality, 34% residents of foreign nationality (as compared to a foreign resident population of about 10%). For 84% of the women it was their first abortion, for 3% it was their third or more. One of the 1076 women seeking abortion in the canton of Berne in 1990 was under age 15, 6.9% were aged 15-19 years. 75% were 20-34 years old. This means Switzerland has a very low incidence of teenage pregnancy as compared to other countries. 54% of the women had not used any form of contraception at the moment of conception. In other words: 46% were failures of contraception. About 50% of pregnancies were terminated within 9 weeks of the beginning of the last menstrual period (LMP). 8% were interrupted after 12 weeks LMP. Several studies in different cantons showed that Catholic women are relatively more likely to have an abortion than protestant women¹⁶.

Factors influencing the shift to a more liberal practice

What are the factors which have influenced the evolution just described? The first

¹⁵ Kellerhals, J. et al.: "Le sens de l'avortement". Georg, 1976.

¹⁶ Kellerhals, J. et al.: "Le sens de l'avortement". Georg, 1976.

thing to be noted is that the differences in the practice of abortion from one canton to the other exactly coincides with the differences in public opinion: the most liberal cantons are those where clear majorities of the population have said yes to abortion on request in 1977 and no to an absolutist "right to life" in 1985. The very restrictive cantons on the other hand are those where large majorities were against abortion on request and "pro-life" (within quotation marks!).¹⁷

The analysis of all three abortion referenda 1977, 1978 and 1985, shows extreme differences in public opinion: Catholics, members of christian parties, older people, people living in the countryside and in the German part of Switzerland tended to be more against choice, whereas a majority of people living in towns and in the French speaking cantons, of protestants, of young people and of adherents to left wing and liberal parties were pro-choice. So certainly public opinion has changed the political climate and has had a major influence on practice: densely populated, protestant and French speaking cantons are the liberal ones. Catholic, more rural cantons in German speaking Central Switzerland are the conservative ones.

The changing views of medical practitioners have also contributed greatly to progress during the last 20 years. A recent investigation based on personal interviews with many practitioners directly concerned with abortion (gynaecological consultants, doctors performing abortions, family planning workers, doctors authorized to deliver the second opinion according to art. 120 of the Penal code) revealed that most of them think it is up to the woman to decide about an abortion¹⁸.

The fact that the anti-choice movement was so decisively beaten in the referendum of 1985 certainly has influenced the political climate too. Another important factor of course is the rising self-consciousness of women and their changing role in society. More and more women are engaging in the labour force and are becoming politically active. Yet another contributing factor is changes in social values, in particular as far as sexuality, the family and motherhood are concerned. Equal rights have been granted in the constitution, and the marriage law, the law of filiation, and the part of the Penal code dealing with sex crimes have all been modernised.

Swiss society is evolving away from traditional values towards modernism and individualism. Self-determination, personal freedom and responsibility, less state interference in private life are political aims for left and right wing parties. I hope

¹⁷ Ketting, Evert et al.: "Schwangerschaftsabbruch: Gesetz und Praxis im internat. Vergleich". Tübingen Reihe, 1985.

¹⁸ ASDAC: "Interruption de grossesse en Suisse: Loi, pratiques et prévention" (German version: Schwangerschaftsabbruch in der Schweiz: Gesetz, Praxis und Prävention). Lausanne, 1990.

I am right when I dare say that this evolution will continue. At least several opinion polls and sociological analysis have pointed in this direction.

The Union Suisse pour Decriminaliser l'Avortement (USPDA) has tried twice in the eighties to relaunch the political debate about abortion - with no success. There was not much political interest in the topic, since the situation in practice is not too bad and everybody more or less seems to cope one way or another with the current legislation. Nobody was eager to stir up the battle again. But we think the moment has come now to give our law, which is totally out of date and has practically fallen in disuse, the finishing stroke. All the more as abortion is of political actuality again in many countries. At this moment, we are trying to introduce the issue into Parliament again and to start a parliamentary initiative. The aim is to change the penal code and to give women the right to choose, at least within the first few months of pregnancy, without a second medical opinion and without administrative hurdles. The reasoning is that we want to put an end to the semi-legality and to the cleavage between the law and practice. A practice which might change arbitrarily any day, depending as it is on individual doctors in a hospital or an individual member of a cantonal government. Abortion should no longer be a criminal act and a taboo. The fundamental right of women to decide freely about whether or not to have a child must at last be recognised. This right must include free access to legal abortion as a backup measure. Finally we would like to see Switzerland follow the example of more advanced legislations in the majority of other European countries.

Of course I cannot tell you whether we will reach our aim. One big obstacle we have to jump is the fact that any Bill has to pass both Houses of Parliament, and in the Upper House, where every canton has two representatives, the small Catholic cantons have a heavy weight. In the end, there would certainly be a referendum. I'm optimistic that we can get a majority in the Lower House (National Council) and later on, on the ballot. But certainly we will have to work hard to convince a majority in the Upper House.

If we succeed, this will give women and doctors the certainty of not being criminals when they need or carry out an abortion. It will make abortion accessible with less hurdles, with less humiliation and delay and at less cost. Abortion will become what it really ought to be: a private problem that may occur in any woman's life and which is to be resolved between herself, her partner and her doctor. But even if we succeed, we will still have to continue fighting for more outpatient and sympathetic abortion services, if we want abortion to be more equally available throughout the country. In this regard the availability of RU 486, the abortion pill, could help us a lot - but this is yet another story.

Switzerland/Ireland: Summary of the Discussion

Sally SHELDON (discussant)

The comparison between Ireland and Switzerland is an extremely interesting one, and not least as an illustration of how very restrictive written laws can coexist with quite different practices. My first point is almost a banality, being said over and over again within the abortion debates in various countries, yet it is nonetheless one which is worth making: the criminalisation of abortion does not prevent its occurrence, but merely effects the conditions in which it will take place. Rich women will travel for their abortions, poor women may be forced to resort to more desperate means. We see the now common phenomenon of widespread 'gynaecological tourism'.

Despite both having extremely restrictive laws, this focus on the actual conditions in which abortion happens in various countries reveals stark differences between Switzerland and Ireland. In Switzerland, the 'gynaecological tourism' which occurs is largely internal with women travelling from conservative cantons to those which adopt a more liberal interpretation of the law. Irish women are forced to leave their country and travel to the England. In Switzerland, I was interested to hear that the Federal Court has ensured that the cantons cannot restrict the availability of abortion to their own residents. Whilst likewise, the UK does not restrict the availability of abortions in general, a particular restriction has been introduced with respect of the abortion pill, RU 486 which will not be made available to non-resident women. This is presumably to stop the UK becoming a 'resort' for early as well as late abortions. In Switzerland, we heard that abortions are largely funded by medical insurance. In the UK large numbers of abortions are performed outside the NHS (although this varies significantly according to the region), so presumably Irish women must finance their own abortions. What happens to poor women? Ursula mentioned that travelling to England is not an option for all. Is there then still an incidence of illegal abortions in Ireland? Or are there underground women's groups which practice self-help early abortions by menstrual evacuation? A recent American publication: *A Book of Women's Choices*, has given a detailed account of how this procedure can be performed safely. This practice doesn't take place in the UK, partly because abortion is reasonably easily available in practice.

There are also striking differences in attitudes to abortion in the two countries.

In Switzerland we have heard about the good sex education and access to contraception. In Ireland the situation is very different. I was surprised to hear how low that abortion rate is in Switzerland: 8 women per 1,000 women between 15 and 44 abort yearly. This compares with a figure of around 15 women per 1,000 in the UK for 1991. This figure is impossible to know for Ireland. 5,000 women per year having abortions in the UK give Irish addresses, but presumably the real figure is much higher than this. Has anyone attempted to estimate it? Presumably, given the poor sex education and access to contraception, the figure will be high. Another factor which should suggest a higher abortion rate is the strong Roman Catholicism of the country - there does seem to be some indication of a positive correlation between Catholicism and an increased likelihood of abortion (and this was shown as well in the Swiss case).

Abortion seems to have been kept from becoming a very politicized issue in Switzerland to a far greater extent than has been the case elsewhere. Ursula made the point that in a certain sense putting the right to life amendment into the Constitution was a mistake for the Irish 'Pro-Life' movement, who succeeded thereby in making sure that abortion remained on the agenda. Are you worried, Anne-Marie, that by pushing for reform in Switzerland, you will create a focal point for the mobilization of the anti-choice forces? Is there any possibility of a backlash?

We have been discussing the two most restrictive abortion laws in Western Europe. Lastly, I would like to briefly mention the situation in the six counties of Northern Ireland which is probably the next most restrictive law in Western Europe, but is one which is discussed surprisingly seldom. Northern Irish women normally have to travel to England for their abortions and 1,000 of them do so each year (although there is no ban on information about doing so). They do not have the same rights as other UK citizens. In 1990, the British Parliament debated a series of reforms to the 1967 Abortion Act. One reform proposed was the extension of the Act to Northern Ireland. This was opposed by all of the 16 or 17 MPs in the House of Commons who represent constituencies within the six counties (all of whom were men). It was also opposed by all the political parties there, with the exception of Sinn Fein which declared itself neutral on the issue. Eventually the reform was defeated by a ratio of 2 votes to 1. Thus, it is important to remember, when discussing restrictive abortion laws, that one of the most restrictive laws in Western Europe is that governing part of the United Kingdom, and more lobbying should certainly be done in that area.

Ellen Goetz: The situation in Switzerland is reminiscent of the situation in the USA prior to the decision in *Roe v Wade*, in that identical laws can coexist with startlingly different abortion rates. The abortion rates are dependent on social and political factors rather than the legal situation, and in fact the *Roe* decision did not significantly alter these rates, even where the law was significantly liberalised. This seem to indicate an arbitrary imposition of the law against

certain groups of women. This questions the very Rule of Law. In *Casey* the court only mentioned the question of rights, what concerned them far more was the legitimacy of the court.

Valeria Russo: (to Ursula Barry): You said that placing the pregnant woman on a equal legal status to the foetus she carries, was an important issue debated in Ireland. Is equality here just a euphemism? In Catholic doctrine, woman and foetus are not equal - rather the foetus has superior rights within theological arguments. Think of the biblical example of Mary and Joseph - neither of them had any say in the matter!

You are correct when you talk about the importance of focusing on individual cases. In Italy, we have had the recent example of the Catholic, Carla Levanti who decided to die rather than have an abortion.

In Ireland, where the Catholic church focuses on foetal rights, what is their stance on artificial conception? Are they strongly against it (as is their position in Italy)? The Pope is against both contraception and artificial conception. Underlying this is the notion of conception as a divine gift, not something that can be chosen by human beings.

Ursula Barry: The church in Ireland absolutely opposes any form of artificial control of reproduction. This is firstly because reproduction is seen as a divine process, and secondly because it believes it unacceptable to make any separation between procreation and sex.

With regard to the status of the foetus, neither 'Pro-Life' nor the Roman Catholic church have ever conceded that there can ever be a conflict between the rights of the pregnant woman and those of the foetus, whatever the situation. Two days before I arrived here, the Medical Council for Ireland (and the medical profession is particularly conservative) which has been debating the abortion situation ever since the Supreme Court decision last March announced its conclusions. It said that having deliberated on the findings of the Court, that it was mistaken in the view that there could ever be a conflict between the woman and the foetus. In the *X* case, the life of the girl was not at risk as she was merely suicidal, and could have been prevented from committing suicide. Further, the Council refused to recognise any physical condition which could necessitate abortion. However, in the following days, one third of the medical profession came out against this majority view. But the view is still in line with the Catholic church's position that any conflict is impossible. In that sense, equality means the supremacy of the foetus' rights. However, when this is converted into law, what the courts found was two competing rights which had to be balanced. So although this isn't a point that the church or anti-abortion movement would concede, this is the courts' interpretation.

I was also asked about the incidence of illegal abortions within Ireland. We don't have backstreet abortions. When I said that abortion in England was not an option that was available to all women, this was not just a problem of the money to go (and there are various organisations who provide women with financial and other support in these cases). Rather, the problem occurs even before this - for many very poor women, in marginalised communities the pregnancy may be well advanced before its existence is even recognised, so it's not just a question of being prepared to have an abortion, but not having the money. What we do still have in Ireland is infanticide. We have had major controversial court cases on this. The last prosecution for illegal abortion in Ireland was in 1966, immediately prior to the partial decriminalisation in Britain, when abortion there became available to women. Some research which was done on the incidence of illegal abortion in Ireland found that there was a high occurrence during the Second World War, when travel between Ireland and England was restricted.

To come on to the situation in Northern Ireland - doctors here are still operating on the basis of *R v Bourne*, whereby abortions are allowed only in very limited circumstances (for example, in the case of foetal abnormality, or on very young girls, particularly where there has been violence involved in the pregnancy). So the situation here is intermediary and is arising from a single court case. Northern Ireland provides an example of where the liberalisation of abortion has been opposed by a combination of fundamental protestantism and Roman Catholicism.

Ulli d'Oliveira: I have two remarks. Firstly, it seems important to focus some attention on the role of the medical profession (a so-called liberal profession). Although, this role differs from country to country, the profession always emerges as an important and powerful lobby either for or against abortion. There are two factions in Ireland, it may be different elsewhere, but one thing that they will always agree on is that abortion should be under their control - it is their job and no one else's. This is what a profession means - they have their business and will strive for exclusive power over it. So, we can't just talk of women versus the State, but we must also think of women versus the profession. It may be that self help can play a role. The debate is similar to that around the issue of who is in control of pregnancy: is it doctors or is it midwives? Could one part in a strategy to 'banalise' abortion, make use of midwives?

Secondly, Ursula Barry didn't mention the aspect of European Community law. This could be a lever to force change from outside Ireland. The EC legal order is developing from something which has to do with money and markets, to something which has to do with citizenship rights and these, to my mind, involve human rights. What doctors do within the market is to provide services. Furthermore, in terms of markets, there is freedom not only to provide but also to receive services wherever you want. In the 'X case' what is at stake is freedom of movement and freedom to receive services elsewhere. It is not just a question of

Irish law, but also one of the power of EC law. Medical services are services like others. Furthermore, as the ECJ has said on many occasions, fundamental freedoms as enshrined in the human rights convention, the Rome Convention of 1950, form part of the principles of EC law. If then, in the *Hamilton* case the ECHR says something about this issue, it has to be integrated into EC law. The freedom of information is also at stake here. Irish student bodies were prevented from providing information about abortion clinics in the UK. This must be addressed under EC law. In this case, the ECJ took the cowardly way out. It said that the student bodies had no direct economic link with the student bodies in the UK. The obvious solution is to provide such a link and see what they say next to wriggle out of this affair! This is not just a battle to be fought within Ireland. There are also levers which can be used from outside.

Olwen Hufton: These last points have broadened the discussion considerably. It is important to remember that British women don't have a right to have an abortion - rather doctors have the right to perform them. I have a question for Ursula Barry. Does she discern an age specific response to the question of the rectitude of abortion, in Ireland? Do younger women of childbearing years have a very different view from older women? This has been my personal impression.

Ursula Barry: Firstly on the EC law question: since we lost the *Grogan* case we have set up what is technically a commercial relationship between the clinics offering advice in Ireland and abortion clinics in England. We are now waiting for them to try to prevent us from giving information so that the matter can be referred back to the ECJ - we need to be prevented from doing something before we can test this again at the EC level.

Still on the subject of EC law, myself and two other women who in the course of our work have to travel, have petitioned the European Parliament on the basis that we cannot function as commercial entities within the EC. One of the positive things about this procedure is that although it is not tremendously powerful, it forces different sections to give their opinion on the petition. So for example, the legal affairs department, the women's rights section of the Parliament, the fair competition section of the Commission all will have to provide a view on the petition. We are waiting for the results. We put in the petition last April and within a year we should get views from all of these different sections, and then the European Parliament will pass resolutions and ask the Council of Ministers to deal with infringements they have identified (although there is no obligation on the latter to do so). This procedure is interesting because it forces them to declare views in areas where they would prefer not to do so. They are really reluctant to take on these issues as they are afraid of an anti-European backlash if they are seen to interfere with the cultural integrity of individual nation states. So its very difficult to force the European institutions to act to establish or to enforce rights of this kind. The process has been difficult and frustrating but we think that we need to use all the levers possible to influence the Irish State from all sides

possible.

To come to the question of whether there is an age specific response on abortion rights: yes, there is some indication of one. Pro-Choice attitudes are more prevalent in younger women, and also in urban areas. However, the strongest support for the Pro-Choice comes from women in the 30-45 year old bracket. These women are in the midst of their childbearing years with practical experience or circumstances that can arise. The younger age group comes out of school at 18 having been bombarded with anti-abortion films (including that horrific piece of propaganda, *The Silent Scream*). This takes a lot of untangling and time to acquire experience and the maturity to make one's own judgments. Pro-Choice has much less support amongst the 55 plus age group who are very strongly against abortion.

Anne-Marie Rey: I wanted to come back to the question of whether we fear a backlash in Switzerland, sparked off by our political initiative. The 'Right to Life' movement has had so many opportunities to campaign in Switzerland and has shown it to be a small minority of the population (30% at the very highest), so we have no fears there. If there were a backlash we would have a revolution! The worst possible scenario would simply be for the situation to stay as it is in the conservative cantons.

Monika Frommel: I cannot find anything resembling the US Center for Law and Reproductive Policy in Germany or elsewhere in Europe. There is no organisation which can provide advice for European organisations such as ENWRAC (the European Network for Women's Right to Abortion and Contraception), and yet there is a real need for such legal advice. How can we find lawyers willing to help? How can we create new legal arguments? Is there any possibility of help from the EUI? Are there researchers here who work on such topics? What can we do concretely in the cases of Poland and Ireland? We need to find not just social and political - but more importantly legal arguments. The situation is Italy, in Germany and in other countries is not good, but we can live with it: this is a question of internal work to mobilise and organise. But in the Polish and Irish cases, the question is one of international intervention and sanctions. It would be useful if there could be cooperation with the EUI in these fields.

Wanda Nowicka: We are still looking for loopholes, for ways to attack the Polish law. How can we use the European Parliament? This is a body of which we have no experience.

Yota Kravaritou: By way of conclusion, I would like to make a few remarks. Firstly, it is imperative to remember the differences between the different national cultures. Moreover, we have seen how great can be the diversity in the actual implementation of the same law within one country: this was especially brought home by the cases of Switzerland and Germany. We have also heard about the

resistance of women - nothing stops women from having their own politics.

It is important to note the great differences which exists between the USA and Europe and especially the very different traditions with regard to human rights resulting from different philosophy and culture. Liberalism penetrates everything (especially judicial decisions and legal thought) in the US. In Europe, however, we have individual rights but also we have a deep-rooted concept of social rights in Europe. We can't use the US debate and philosophical terms within a European context, without a great degree of care. In Europe we have social rights and a tradition of 'l'Etat providence', and the union movement. This is different from the USA.

With regard to the special cases of Ireland and Poland, their situation is related to their nationalism which is connected to their past oppression. Its not just a question of Catholicism: Italy is also Roman Catholic, but does not have the same problems. There are historical reasons which have had a negative impact on human rights in Europe. It is astonishing that there are these two Constitutional texts which do not accept women's rights. It is not acceptable that the rights of the foetus can take precedence over those of the woman. Further, it is too narrow just to speak of reproductive rights and liberties. We also need to talk of a right to pleasure, a right to ecstasy. Women are not just 'reproductive machines'!

It is worth continuing a little longer to discuss what we can do on a concrete level.

Monika Frommel: 'Reproductive liberty' is indeed a term situated within a US context. But we've also had some ideas here: to argue with the term of access to medical services. The work we must do is to translate what reproductive liberty means within different contexts. Jurisprudence is nothing but rhetoric. We are free to invent new terms. It is sometimes thought that women's liberty is something anti-legalistic, but this is wrong.

Is there any possibility of research being done here at the EUI which might study Polish law and see if it is possible to present its case at the ECHR? Are there any researchers here who are specialised in that area?

Ulli d'Oliveira: Is Poland a signatory to the European Convention of Human Rights?

Wanda Nowicka: Almost!

Ulli d'Oliveira: A better course of action might be to encourage researchers to apply to the EUI to study this kind of issue.

Ellen Goetz: Whilst US policy arguments may not necessarily transplant very easily to the European countries, there is something which Europe can learn from

the US experience. The US 'Pro-Life' movement is exporting its tactics to other countries. European movements might learn from our experience in combatting their strategies.

Ursula Barry: We must also remember that we cannot use framework of Western Europe to understand the newly forming democracies in Europe. It seems to me that the US has a growing influence on parts of Europe especially the developing Eastern European constitutions, and also on the Spanish and Portuguese Constitutions. We must be conscious of what we mean when we say 'Europe' - Europe is not just France, Germany, Italy and the UK. We must be careful that our concept of Europe is not one which is now out of date.

One last point on the European Court of Human Rights - we need to look not only at the position in formal law, but also at the question of enforcement. Ireland has been in breach of the European Convention of Human Rights for four years on the question of homosexuality (which remains criminalised in Ireland) and nothing has changed. We need to look at enforcement procedures. Winning this judgment has been important for the law reform movement, but it still hasn't been enforced by the Council of Europe.

*En guise de conclusions*¹⁹

Yota KRAVARITOU

Il y aura quelques réflexions et remarques à faire en guise de conclusion à notre séminaire sur le défi que l'avortement pose au droit et encore plus aux femmes, notamment dans certains pays européens, à l'heure actuelle. Le poids de la culture a été déterminant dans nos échanges et si la culture de chacune de nous a constitué un ressource (source) de richesses du séminaire, et nous a bien permis d'avoir une image plus claire et précise des législations et pratiques des pays en question, on a pu aussi constater son empreinte juridique dans la régulation juridique de l'avortement et dans l'élaboration de concepts juridiques: ceux-ci ne sont pas identiques d'un pays à l'autre. Les divergences les plus importantes semblent exister notamment entre l'Europe et les Etats-Unis. La raison en est une culture juridique, une tradition juridique différente qui se reflète, pas seulement dans la résolution du même problème, mais aussi dans le langage et les notions utilisés et leur signification parfois invisible à première vue. J'y reviendrai.

Effet aussi de traditions culturelles locales, étroitement liées souvent aux politiques de l'Eglise, est la diversité de l'application de la même loi dans le même pays, comme c'est le cas en Allemagne, en Italie et en Suisse -ce qui provoque un tourisme même interne pour se faire avorter.

En réfléchissant un peu à ce phénomène de tourisme-avortement qui a connu un grand essor en Europe dans les années 60 -certes, pas par toutes les femmes, mais par celles qui avaient l'information et pouvaient trouver les moyens- on ne peut pas ne pas penser que c'est un des moyens utilisés par les femmes, en tant que sujet collectif, pour résister et exprimer leur propre politique contre la politique de l'Etat à leur égard, à l'égard de leur corps. On sait d'ailleurs que les femmes qui ont voulu avorter l'ont toujours fait même si elles devaient le faire au prix de leur santé et même de leur vie.

La transgression de la loi sur l'avortement par les femmes est devenue en réalité un fait banal pour certains pays comme la Grèce ou la Suisse. Elle ne constitue même pas une question centrale dans la vie du pays. Il en est cependant autrement en Irlande où la réglementation du droit de l'avortement est une

¹⁹ © Yota Kravaritou.

question éminemment politique qui provoque des crises politiques les plus profondes.

Or, c'est la réglementation même du droit de l'avortement qui est dans ce cas en cause. La question n'est pas brûlante seulement à l'intérieur du pays: elle pose des problèmes dans l'ordre juridique communautaire (quant au droit notamment à la libre circulation des personnes et des services) mais aussi aux juridictions communautaires des Droits de l'Homme quant aux droits des femmes. Il faut y revenir.

A l'occasion de la proposition de loi polonaise qui partage la conception de l'Irlande quant à la relation femme/foetus: celle-ci est à vrai dire très éloignée de la conception qui prévaut notamment dans les Etats membres continentaux. Il en est de même aussi quant à l'Angleterre qui appartient à cette même famille juridique, celle de Common Law. Le problème, on l'a vu au cours de notre séminaire, est ailleurs: il n'a rien à faire avec les caractéristiques du système juridique auquel ces pays appartiennent.

Le dénominateur commun -ou un des points communs- entre l'Irlande et la Pologne paraît être une sorte de nationalisme dû à des relations historiques, des relations de dépendance avec des puissances étrangères d'un autre dogme religieux. Liée à une sorte d'identité nationale pure, cette situation est en relation non pas avec le simple retour de la religion, mais avec certains des préjugés des plus archaïques et fondamentalistes qui réservent aux femmes une place d'infériorité et de dépendance. Or, ces "valeurs" sont une chose, le droit en est une autre. Même si une nouvelle argumentation sur base des valeurs éthiques et de la morale est développée outre-atlantique, dans le climat hautement polarisé en matière d'avortement aux Etats-Unis -pays pionnier en ce qui concerne la légalisation de l'avortement il y a dix-neuf ans-, il nous paraît exister une réalité et une tradition juridique toute différente en Europe: imposer cette argumentation d'une certaine façon "exportée" - n'aurait pas de sens, tant en ce qui concerne les Etats membres de la CEE, que les Etats ex-socialistes comme la Pologne.

En tout cas, le libéralisme sauvage instauré dans les pays ex-socialistes après l'entrée du régime communiste, ne joue pas en faveur des femmes, comme nous avons constaté à notre conférence consacrée à la vie quotidienne des femmes dans les pays ex-socialistes. Le simple fait qu'elles soient beaucoup moins nombreuses qu'auparavant, ou simplement inexistantes, dans les parlements ou les organes de décision, n'aide point à défendre leurs intérêts et droits et points de vue dans les projets de loi et les politiques proposées. Si on a senti une sorte de désespoir et d'impuissance dans l'intervention de Wanda Nowicka concernant la Pologne, notre réponse ne peut être articulée, je crois, qu'au niveau de la conception européenne des droits de l'homme et de la femme en vertu de la Convention Européenne et de la jurisprudence en matière des juridictions européennes.

Quant au débat italien, vif en effet, sur la morale, lié à l'avortement, fécondé par la bioéthique -les problèmes de la légitimation des techniques utilisées dans la génétique- et le discours écologique sur la vie (le droit à la "vie"), on ne saurait qu'être d'accord tant avec Marina Calloni qu'avec Claudia Mancina sur la nécessité d'élaborer une nouvelle argumentation et un langage plus riche et articulé dans le nouveau contexte culturel en y prenant en considération aussi le développement effectué dans le champ psychanalytique (en ce qui concerne les écologistes, espérons qu'il n'y en ait pas parmi eux qui assimilent la femme à la nature - on a déjà beaucoup écrit sur les conséquences de ces thèmes du 18ème siècle dans le cadre de Women's Studies).

Il faudrait cependant faire attention à l'utilisation des termes que l'on emploie, lesquels en philosophie ont un autre contenu, une autre signification qu'en droit. Celui-ci en tant que discipline a ses propres techniques et sa terminologie: le terme vie, droit à la vie, individu, personne, ont en droit une signification bien précise et claire. Ainsi, le droit à la vie est un droit absolu, le fœtus n'est pas une personne.

Quoiqu'il en soit, en ce qui concerne la discussion biologique, bioéthique, sur l'existence de plusieurs degrés de vie, rien ne peut changer qu'en droit le fœtus n'est pas une personne. Certes qu'il y a conflit, mais non pas entre deux êtres humains, à savoir entre la femme et l'embryon ou le fœtus: le conflit est avant tout celui de la femme et localisé dans son propre corps. Le droit à l'autodétermination est d'ailleurs en relation directe avec une réalité concrète tant objective que subjective qui impose à la femme un choix, une décision. Décision liée à la réflexion pourquoi donner la vie si on ne peut assurer à cette vie une "bonne vie", ou même lui assurer souvent les simples et indispensables "frais" pour sa survie. Il y aurait encore des choses à dire sur cette question dans un contexte plus large que celui du juridique.

En ce qui concerne maintenant l'argumentation et la réglementation juridique sur l'avortement, il faut que l'on soit situé -comme les juristes comparatistes nous savons bien- dans le contexte spécifique culturel, dans la tradition juridique propre à chaque ordre ou système juridique pour pouvoir en discuter proprement. Ainsi, ce n'est pas un hasard qu'en Europe continentale au moins -comme Monica Frommel l'a bien remarqué- nous n'utilisons pas le terme "reproductive rights" si familier aux Etats-Unis d'où il nous vient et nous en avons du mal à le traduire dans les autres langues -français, allemand, italien, grec-.

D'une certaine façon, celui-ci n'est pas utile, ne peut pas être un outil pour nos systèmes juridiques européens, surtout continentaux, parce que ceux-ci se basent, quant à la réglementation du droit à l'avortement, sur d'autres notions juridiques, telles l'autodétermination, l'intégrité corporelle, la dignité, l'intimité de la personne et autres. Or, ce raisonnement juridique, cette façon de raisonner en droit, est en relation avec une tradition -et aussi un "vécu"- des Droits de l'Homme différente

en Europe qu'aux Etats-Unis. Il est lié aussi avec un esprit philosophique aussi différent qui imprègne grosso modo les Droits de l'Homme des deux côtés de l'Atlantique: aux USA il y a un libéralisme et une centralité de l'individu plus poussés par rapport à ce qui prévaut en Europe où les droits individuels ont été complétés par les droits sociaux (qui a affaire aussi avec l'Etat providence à l'européenne). Une des conséquences de ce cheminement et contexte différent est qu'il n'existe pas en Europe "les droits du fœtus" comme on les entend dans l'ordre juridique nord-américain. J'ai l'impression qu'en terre européenne où sont cultivés tant les droits individuels que les droits sociaux il y aurait moins, beaucoup moins, de tensions et de polarisation qu'aux Etats-Unis.

Si les raisons de pleine reconnaissance du droit à l'avortement, non seulement en cas de viol et pour des raisons médicales, mais aussi en cas de grossesses indésirables, sont les mêmes dans tous les pays du monde -et de ce point de vue on peut parler d'une universalisation du droit à l'avortement- la réglementation et les notions juridiques sont différentes d'un pays à l'autre, d'un ordre juridique à l'autre.

Etant donné que des différences importantes existent au niveau juridique entre les Etats-Unis et l'Europe -indépendamment du fait que le droit américain en la matière a eu un effet favorable pendant les années soixante-dix dans les débats sur la libéralisation de cette matière- la question qui se pose actuellement est la suivante: est-ce que la législation irlandaise -et cela concerne aussi le projet de loi polonais- qui traite de la même façon la vie de la femme et celle de l'embryon et du fœtus qu'elle porte -sur base de la fiction qu'il s'agit d'individus à droits égaux- ne viole pas certains principes généraux du droit ainsi que la Convention Européenne des Droits de l'Homme qui fait partie intégrante de l'ordre juridique communautaire? Il s'agit notamment de l'autonomie (autodétermination), de l'intégrité corporelle, de la liberté d'expression jusqu'au droit de la femme à la santé. De l'autre côté, la législation de ce type ne restructure-t-elle pas le concept de la femme, comme l'a dit Ursula Barry, en portant atteinte à son autonomie, sa volonté d'expression et ne reforge pas de chaînes qui la lient à sa "nature" procréatrice en lui enlevant (de nouveau) son droit d'individu libre à choisir? Est-ce-que dans la tradition européenne des Droits de l'Homme on peut accepter, on peut concevoir, qu'on exerce du pouvoir sur le corps d'un autre individu? Quid encore de l'égalité entre hommes et femmes, quid de l'égalité entre les femmes européennes elles-mêmes?

Quelles réponses donneraient à ces questions les juridictions européennes qui s'occupent -et vénèrent- les Droits de l'Homme, soit à Strasbourg, soit à Luxembourg?

Il serait éventuellement opportun de créer un groupe de travail sur les Droits Fondamentaux de la Femme en Europe pour mieux étudier ces questions juridiques, pouvoir agir notamment auprès de la Cour des Droits de l'Homme à

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Strasbourg, élaborer des revendications paneuropéennes portant sur le respect des droits et libertés des femmes et sur la possibilité d'accès effectif aux services médicaux en cas d'avortement.

Il faudrait aussi trouver les moyens pour arrêter le harcèlement que les femmes subissent par le discours, les actions, les films importés sur le développement du fœtus, la terminologie qui fait de la femme enceinte de quelques semaines, une mère. Il y aurait peut-être lieu de réfléchir si on ne pourrait pas étendre la notion de harcèlement sexuel à ce type de violence et de chantage.

APPENDIX 1 - The Polish Abortion Law

The law of 7 January 1993 on family planning, protection of human embryos and conditions of access to abortion.

In recognition of the fact that life is a fundamental value, and that concern for life and health is one of basic duties of the State, society and its citizens, the following is hereby proclaimed:

Art. 1

1. Each human being has a right to life starting from the moment of conception.
2. The life and health of a child from the moment of its conception will remain under the protection of law.

Art. 2

1. Governmental administration and local self-governing bodies, to the extent of their competence as defined in detailed regulations, are obliged to provide pregnant women with social, medical and legal care, in particular:
 - 1) medical care for the conceived child and its mother and women during the period of pregnancy;
 - 2) material help and care for pregnant women facing difficult financial situations during and after delivery;
 - 3) information services, giving details of rights, allowances and benefits to which families, married and unmarried mothers and their children are entitled, as well as the possibilities of adoption, and information on services available for solving psychological and social problems.
2. Governmental administration and local self-governing bodies, within the extent of their competence as defined in detailed regulations, are obliged to provide citizens with free access to methods and means of conscious procreation.
3. Schools are obliged to grant leave to pregnant students, as well as other kinds of help which are necessary to complete their education, and where possible, this must be done without any delay. If pregnancy, delivery or confinement lead to inability to take examinations which are important for the continuance of education, the school is obliged to appoint another examination date which is convenient to the woman, within a period not exceeding 6 months.
4. The scope, forms and procedures of assistance, mentioned in items 1 and 2 will be defined by special regulations issued by the Council of Ministers.

Art. 3

1. Governmental administration and self-governing bodies will cooperate with and provide assistance to the Catholic Church, other churches and religious

associations, as well as social organizations, in organizing for the care of pregnant women, for foster families and in giving assistance in adoption.

2. The scope, forms and procedures of assistance, mentioned in item 1 will be defined in special regulations issued by the Council of Ministers.

Art. 4

1. Sex education will be introduced onto the school curricula, regarding principles of conscious and responsible parenthood, family values and values regarding conceived life, as well as education regarding methods and means of conscious procreation.

2. The Minister of Education will lay down the detailed curriculum for schools, mentioned in item 1.

Art. 5

Art. 15(2)(4) of the law of 24th of October 1950, regarding the medical profession (Journal of Laws, No. 50, item 458 and No. 53, item 489, from 1956 No. 12 item 61 and from 1989 No. 30 item 158) is hereby cancelled.

Art. 6

The following changes are introduced into the Civil Code:

1) to art.8.

a) the existing contents shall be marked 1

b) to paragraph 1 shall be added the following: "2. The conceived child is also entitled to legal rights, however it will obtain property rights on the condition that it is born alive;"

2) after art. 446, art. 446' shall be added the following: "Art. 446'. At the moment of birth a child can demand compensation for injuries sustained prior to birth.

Art. 7

The Following changes shall be introduced to the Criminal Code:

1) after art. 23(a), shall be added the following:

"Art. 23(b)(1) The conceived child cannot be a subject of action unless such action serves the protection of the life and health of the child and of its mother, and except for the activities defined in paragraph 2.

(2) Pre-natal examinations which do not increase the danger of miscarriage shall be allowed in cases where:

1. the conceived child belongs to a genetically burdened family;

2. there is a suspicion of a genetic illness which it is possible to treat, to cure or of which the results might be limited, by way of treatment in utero;

3. there is suspicion of heavy foetal malformation."

2) after art. 149, art. 149(a) and 149(b) are added as follows:

"Art. 149(a)(1) Whosoever shall cause the death of a conceived child shall be subject to 2 years of imprisonment.

(2) The mother of a conceived child shall not be subject to punishment.

(3) The physician who shall undertake such activity in a public medical centre does not commit the crime mentioned above in cases where:

1. pregnancy threatens the life or seriously threatens the health of the mother, where this is certified by two physicians other than the acting physician, however such certification shall not be necessary in the case of an urgent need to prevent threat to life.

2. the death of the conceived child was a result of actions carried out in order to save the mother's life or to prevent serious damage to the mother's health and the existence of the danger has been confirmed by two other physicians.

3. pre-natal tests are confirmed by two other physicians to show serious and irreversible malformation of the foetus.

4. it is proved by an attorney that pregnancy was the result of a criminal action.

5. in some justified cases a court is allowed to renounce the punishment of persons who committed the crime mentioned in paragraph 1.

Art. 149(b) Whosoever, when using violence against a pregnant woman, shall cause the death of a conceived child, or in any other way shall cause the death of a conceived child without the pregnant woman's permission whether by way of violence, threat or by convincing the mother of a conceived child to deprive this child of life, will be sentenced from 6 months to 8 years of imprisonment."

3) arts. 153 and 154 are hereby cancelled;

4) after art. 156, art. 156(a) shall be added as follows:

"Art. 156(a)(1) Whosoever shall causes damage to the body or health of a conceived child, so as threaten its life, will be sentenced for a period not exceeding 2 years of imprisonment.

(2) A physician does not commit a crime, where such damages as are suffered, are the result of treatment necessary to stop a danger which was threatening the health and life of a pregnant woman or conceived child.

(3) A mother of a conceived child committing the crime mentioned in (1) will not be punished."

5) in art. 157: (a)(1) shall read as follows:

"(1) If the actions mentioned in art. 156(1) result in the death of a human being, the perpetrator will be sentenced for a term of from 1 to 10 years of imprisonment."

b) a new (2) will be added as follows:

"(2) The perpetrator of the crime mentioned in art. 149(a)(1), art. 149(b) or 156(a)(1) will face the same punishment if the actions result in the death of the mother of a conceived child."

c) the present (2) shall be marked (3).

Art. 8

In the Law of 8th March 1990 on local government (Journal of Laws No. 16, item

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95, No. 32 item 191, No. 34 item 99, No. 43, item 253, No. 89 item 518, from 1991 No. 4 item 18, No. 110 item 473 and from 1992 No. 85 item 428 and No. 100, item 499), to art. 7(1)(16) the following shall be added:

"16) pregnant women are entitled to social, medical and legal assistance.

Art. 9

1. Within one year of this law's implementation, the Minister of Health and Welfare will present a report to the Parliament on the execution of the law and its results.

2. Appropriate reports will be presented by the ministries of Justice, Education and Labour and Social Policy in relation to questions falling within their competencies.

Art. 10

The Law of 27 April, 1956 regarding the conditions of access to abortion is hereby abolished (Journal of Laws, No. 12, item 61 and from 1969, No. 13, item 95).

Art. 11

This Law shall come into effect after 14 days following the date of its announcement.

APPENDIX 2: Changes to the German Law Regarding Abortion²⁰

Marina CALLONI
Kerstin ULLRICH

It is necessary to add the following additional notes to Monika Frommel's article given that since her paper was written Section 218 of the German Penal Code, which she discusses, has undergone a number of changes. A judgment of the Federal Constitutional Court (Bundesverfassungsgericht) delivered in Karlsruhe on 28 May 1993 has in fact changed both the criminal and financial position relating to abortion. In contrast to the previous provisions of s.218, abortion is no longer a crime. However, it remains a "wrongful" act, and one which is not protected by the State. This means that abortion is not recognized as a "social right", instead, it is seen as a "private" choice, which any woman may freely make during her life. Abortions may be performed in public health institutions, however, they must be self-financed.

In contrast to the old Section 218, which recognized the legality of abortion in special cases such as rape, economic difficulties, risk to the mental and physical health of the pregnant woman and foetal deformation, the new Section 218 does not foresee specific instances where abortion will be legal. Neither is a medical prescription compulsory. Further, no public authority now has the right to prevent the woman from making her own decision. Abortion is allowed during the first 12 weeks of pregnancy, provided that the woman wishes to abort of her own free will having first undergone compulsory counselling.

The freedom of choice which women have here gained is at the expense of the loss of State funding for their terminations. Health costs will accordingly no longer be paid by the sickness fund except in exceptional cases involving emergency conditions for the woman or severe foetal malformation. However, in cases of need, the woman may approach the social security for a contribution to the costs of the operation. It should also be mentioned here that two Federal States, Hessen and North-Rhine Westphalia (governed by the SPD), have announced they will be setting up a special fund for abortions, to be financed by the Länder governments.

The changes to Section 218 have also meant that the previous law on abortion becomes invalid. Accordingly, at present there is a period of legislative vacuum pending the adoption of a new law, which must then be approved by the Federal Parliament. However, the legislative pathway looks rather problematic, given that the parliamentary majority had already decided in favour of legalizing abortion, and hence for financing it with Federal Government funds.

The verdict has been greeted by the pro-choice movement, and in particular by the

²⁰ © Marina Calloni and Kerstin Ullrich.

women's movement, not only with great disappointment but also with considerable rancour. What had been expected was not just the decriminalization of abortion but also its social recognition as a State-funded medical practice.

This decision has highlighted a rather paternalistic logic, reaffirmed in the German "ethical State", in the confusion between moral assessments and legal indications. The woman is in fact left with the stigma of illegality: the State allows the practice but does not accept it as legal. Nor can this verdict be satisfactory for women from East Germany who used to enjoy a fairly liberal abortion law, which became invalid at the same time as their national constitution.

Neither should it be forgotten that this decision almost certainly opens the way to more restrictive norms in the sphere of bio-ethics, weighed down as it is by the tragic memory of the experience of eugenics during the Nazi period.

This verdict is undoubtedly the outcome of a complex constitutional compromise between the irreconcilable arguments of the pro-choice and pro-life groups, but above all it is the product of difficult political negotiations between the government parties (led by the CDU) and the opposition groups (supported particularly by the SPD and the Greens). The abortion question has in any case been the undeniable sign of the many difficulties, both constitutional (since the Grundgesetz has been extended to the territory of the ex-GDR too), political and economic that post-unification Germany is at present having to face.

The German Abortion Law (extracts)

The Decisions of the German Constitutional Court (Old and new §218)

The former § 218

Der Paragraph 218 des Strafgesetzbuches steht im Mittelpunkt des erbitterten Rechtsstreits, der am gestrigen Freitag mit dem Urteil des Bundesverfassungsgerichts in Karlsruhe sein vorläufiges Ende gefunden hat. Der Zweite Senat des höchsten Gerichts hatte bereits am 4. August vergangenen Jahres mit einer Einstweiligen Anordnung dafür gesorgt, daß die von einer parteiübergreifenden Mehrheit im Bundestag verabschiedete Neufassung dieser strafrechtlichen Bestimmung nicht in Kraft treten konnte. Damit herrschte im vereinten Deutschland weiterhin gespaltenes Recht in dieser Frage.

Im bisherigen Paragraphen 218 heißt es:

"(1) Wer eine Schwangerschaft abbricht, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.

(2) In besonders schweren Fällen ist die Strafe Freiheitsstrafen von sechs Monaten bis zu fünf Jahren..."

In Paragraph 218a werden dann die Ausnahmen - Indikationen - beschrieben:

"(1) Der Abbruch der Schwangerschaft durch einen Arzt ist nicht nach Paragraph 218 strafbar wenn

1. die Schwangere einwilligt und
2. der Abbruch der Schwangerschaft unter Berücksichtigung der gegenwärtigen und zukünftigen Lebensverhältnisse der Schwangeren nach ärztlicher Erkenntnis angezeigt ist, um eine Gefahr für das Leben oder die Gefahr einer schwerwiegenden Beeinträchtigung des körperlichen oder seelischen Gesundheitszustandes der Schwangeren abzuwenden, und die Gefahr nicht auf eine andere für sie zumutbare Weise abgewendet werden kann...."

Es folgt die Aufzählung weiterer Indikationen - wie die Gefahr einer

schweren Schädigung des Kindes oder Schwangerschaft als Folge strafbarer Taten - und schließlich die Bestimmung, daß in diesen Fällen die Schwangerschaft in den ersten 22 beziehungsweise zwölf Wochen vorgenommen werden darf.

Im neuen umstrittenen Gesetz wurde der Paragraph 218 am Anfang durch einen Satz erweitert und sollte nun lauten:

"(1) Wer eine Schwangerschaft abbricht, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. Handlungen, deren Wirkung vor Abschluß der Einnistung des befruchteten Eis in die Gebärmutter eintritt, gelten nicht als Schwangerschaftsabbruch im Sinne dieses Gesetzes."

Neu gefaßt wird aber im neuen Gesetz vor allem der Paragraph 218 a - 219 befaßt sich dann mit der Beratung -, und zwar

"(1) der Schwangerschaftsabbruch ist nicht rechtswidrig, wenn

1. die Schwangere den Schwangerschaftsabbruch verlangt und dem Arzt durch eine Bescheinigung nach Paragraph 219 Absatz 3 nachgewiesen hat, daß sie sich mindestens drei Tage vor dem Eingriff hat beraten lassen,
2. der Schwangerschaftsabbruch von einem Arzt vorgenommen wird und
3. seit der "Empfängnis nicht mehr als zwölf Wochen vergangen sind."

In den neuen Bundesländern gilt bisher noch das aus der DDR übernommene, 1972 in Kraft getretene Abtreibungsrecht eine von Bedingungen fast freie Fristenregelung. Im deutschen Einigungsvertrag heißt es zu diesem Thema in Artikel 31:

"Es ist Aufgabe des gesamtdeutschen Gesetzgebers, spätestens bis zum 31. Dezember 1992 eine Regelung zu treffen, die den Schutz vorgeburtlichen Lebens und die verfassungskonforme Bewältigung von Konfliktsituationen schwangerer Frauen, insbesondere auf Beratung und soziale Hilfen besser gewährleistet, als dies in beiden Teilen Deutschlands derzeit der Fall ist. ... kommt eine Regelung in der in Satz 1 genannten Frist nicht zustande, gilt das materielle Recht in dem in Artikel 3 genannten Gebiet (der ehemaligen DDR) weiter."

*

Bis zur erforderlichen Neuregelung der für nichtig erklärten Vorschriften hat das Bundesverfassungsgericht eine Übergangsregelung festgesetzt, die am 16. Juni 1993 in Kraft tritt. Danach gilt im wesentlichen folgendes:

Eine Abtreibung bleibt in den ersten drei Monaten der Schwangerschaft strafflos, wenn sie von einem Arzt - auf Verlangen der Frau - vorgenommen wird. Die Frau muß dem Arzt durch eine Bescheinigung nachweisen, daß sie sich mindestens drei Tage vor dem Eingriff von einer anerkannten Beratungsstelle hat beraten lassen.

Da die Beratung "umfassend dem Schutz des ungeborenen Lebens" verpflichtet ist, hat der Zweite Senat detaillierte Regelungen getroffen, die auch den Arzt sowie die Voraussetzungen und das Verfahren der Zulassung von Beratungsstellen betreffen. Die bisherigen Beratungsstellen dürfen bis zum 31. Dezember 1994 ihre Tätigkeit fortsetzen. Die Bundesländer haben ein ausreichendes Angebot wohnortnaher Beratungsstellen sicherzustellen.

Krankenkassen dürfen nur noch "mit Leistungen eintreten", wenn eine kriminologische (Schwangerschaft durch Vergewaltigung), eine medizinische (Gefahr für Leib und Leben der Mutter) oder eine embryopathische Indikation (Gefahr einer nicht behebbaren Schädigung des Kindes) vorliegt.

Frauen, die ohne eine solche Indikation abtreiben, aber den Abbruch nicht bezahlen können, haben aber Anspruch auf Sozialhilfe. Die Übergangsregelung gilt für das gesamte Bundesgebiet.

The new § 218

II. Gemäß § 35 des Gesetzes über das Bundesverfassungsgericht wird angeordnet:

1. Das bisher nach Maßgabe des Urteils vom 4. August 1992 geltende Recht bleibt bis zum 15. Juni 1993 anwendbar. Für die Zeit danach bis zum Inkrafttreten einer gesetzlichen Neuregelung gelten in Ergänzung zu den Vorschriften des Schwangeren- und Familienhilfegesetzes, soweit diese nicht durch Nummer I. der Urteilsformel für nichtig erklärt worden sind, die Nummern 2 bis 9 dieser Anordnung.

2. Paragraph 218 des Strafgesetzbuches in der Fassung des Schwangeren- und Familienhilfegesetzes findet keine Anwendung, wenn die Schwangerschaft innerhalb von zwölf Wochen nach der Empfängnis durch einen Arzt abgebrochen wird, die schwangere Frau den Abbruch verlangt und dem Arzt durch eine Bescheinigung nachgewiesen hat, daß sie sich mindestens drei Tage vor dem Eingriff von einer anerkannten Beratungsstelle (vgl. Nummer 5 dieser Anordnung) hat beraten lassen. Das grundsätzliche Verbot des Schwangerschaftsabbruchs bleibt auch in diesen Fällen unberührt.

3. (1) Die Beratung dient dem Schutz des ungeborenen Lebens. Sie hat sich von dem Bemühen leiten zu lassen, die Frau zur Fortsetzung der Schwangerschaft zu ermutigen und ihr Perspektiven für ein Leben mit dem Kind zu eröffnen; sie soll ihr helfen, eine verantwortliche und gewissenhafte Entscheidung zu treffen. Dabei muß der Frau bewußt sein, daß das Ungeborene in jedem Stadium der Schwangerschaft auch ihr gegenüber ein eigenes Recht auf Leben hat und daß deshalb nach der Rechtsordnung ein Schwangerschaftsabbruch nur in Ausnahmesituationen in Betracht kommen kann, wenn der Frau durch das Austragen des Kindes eine Belastung erwächst, die - vergleichbar den Fällen des § 218 a Absatz 2 und 3 des Strafgesetzbuches in der Fassung des Schwangeren- und Familienhilfegesetzes - so schwer und außergewöhnlich ist, daß sie die zumutbare Opfergrenze übersteigt.

(2) Die Beratung bietet der schwangeren Frau Rat und Hilfe. Sie trägt dazu bei, die im Zusammenhang mit der Schwangerschaft bestehende Konfliktlage zu bewältigen und einer Notlage abzuwenden. Hierzu umfaßt die Beratung

a) das Eintreten in eine Konfliktberatung; dazu wird erwartet, daß die schwangere Frau der sie beratenden Person die Tatsachen mitteilt, deretwegen sie einen Abbruch der Schwangerschaft erwägt;

b) jede nach Sachlage erforderliche medizinische, soziale und juristische Information, die Darlegung der Rechtsansprüche von Mutter und Kind und der möglichen praktischen Hilfen, insbesondere solcher, die die Fortsetzung der Schwangerschaft und die Lage von Mutter und Kind erleichtern;

c) das Angebot, die schwangere Frau bei der Geltendmachung von Ansprüchen, bei der Wohnungssuche, bei der Suche nach einer Betreuungsmöglichkeit für das Kind und bei der Fortsetzung ihrer Ausbildung zu unterstützen, sowie das Angebot einer Nachbetreuung.

Die Beratung unterrichtet auch über Möglichkeiten, ungewollte Schwangerschaften zu vermeiden.

(3) Erforderlichenfalls sind ärztlich, psychologisch oder juristisch ausgebildete Fachkräfte oder andere Personen zu der Beratung hinzuzuziehen. Bei jeder Beratung ist zu prüfen, ob es angezeigt ist, im Einvernehmen mit der schwangeren Frau Dritte, insbesondere den Vater sowie nahe Angehörige beider Eltern des Ungeborenen hinzuzuziehen.

(4) Die schwangere Frau kann auf ihren Wunsch gegenüber der sie beratenden Person anonym bleiben.

(5) Ist es nach dem Inhalt des Beratungsgesprächs dem Ziel der Beratung (Absatz 1 Satz 1) dienlich, ist das Beratungsgespräch alsbald fortzusetzen. Sieht die beratende Person die Beratung als abgeschlossen an, hat die Beratungsstelle der Frau auf Antrag über die Tatsache, daß eine Beratung nach den Absätzen 1 bis 4 stattgefunden hat, eine auf ihren Namen lautende und mit dem Datum des letzten Beratungsgesprächs versehene Bescheinigung auszustellen.

(6) Die beratende Person hat in einer Weise, die keine Rückschlüsse auf die Identität der Beratenen erlaubt, in einem Protokoll das Alter, den Familienstand und die Staatsangehörigkeit der Beratenen, die Zahl ihrer Schwangerschaften, ihrer Kinder und früherer Schwangerschaftsabbrüche festzuhalten. Sie hat ferner die für den Abbruch genannten wesentlichen Gründe, die Dauer des Beratungsgesprächs und gegebenenfalls die zu ihm hinzugezogenen weiteren Personen zu vermerken. Das Protokoll muß auch ausweisen, welche Informationen der Schangeren vermittelt und welche Hilfen ihr angeboten worden sind.

4. (1) Stellen, die eine Beratung nach Nummer 3 vornehmen, bedürfen - unabhängig von einer Anerkennung nach Artikel 1 § 3 des Schwangeren- und Familienhilfegesetzes - besonderer staatlicher Anerkennung. Als Beratungsstellen können auch Einrichtungen freier Träger und Ärzte anerkannt werden.

(2) Beratungsstellen dürfen mit Einrichtungen, in denen Schwangerschaftsabbrüche vorgenommen werden, nicht derart organisatorisch oder durch wirtschaftliche Interessen verbunden sein, daß hiernach ein materielles Interesse der Beratungseinrichtung an der Durchführung von Schwangerschaftsabbrüchen nicht auszuschließen ist. Der Arzt, der den Schwangerschaftsabbruch vornimmt, ist als Berater ausgeschlossen; er darf auch nicht der Beratungsstelle angehören, die die Beratung durchgeführt hat.

(3) Als Beratungsstelle kann nur anerkannt werden, wer für eine Beratung nach Maßgabe der Nummer 3 Gewähr bietet, über für eine solche Beratung in persönlicher und fachlicher Hinsicht qualifiziertes und der Zahl nach ausreichendes Personal verfügt und mit allen Stellen zusammenarbeitet, die öffentliche und private Hilfen für Mutter und Kind gewähren. Die Beratungsstellen sind verpflichtet, die ihrer Beratungstätigkeit zugrundeliegenden Maßstäbe und die dabei gesammelten Erfahrungen jährlich schriftlich niederzulegen.

(4) Die Anerkennung darf nur mit der Maßgabe erteilt werden, daß sie nach einer gesetzlich zu bestimmenden Frist jeweils der Bestätigung durch die zuständige Behörde bedarf.

(5) Die Länder stellen ein ausreichendes Angebot wohnortnaher Beratungsstellen sicher.

5. Dem Arzt, von dem die Frau den Abbruch der Schwangerschaft verlangt, obliegen die sich aus den Urteilsgründen ergebenden Pflichten (D.V.1. und 2.).

6. Das in Nummer 4 vorgesehene Anerkennungsverfahren ist auch für bestehende Beratungsstellen durchzuführen. Bis zu dessen Abschluß, längstens bis zum 31. Dezember 1994, sind sie befugt, gemäß Nummer 3 dieser Anordnung zu beraten.

7. Die Pflicht zur Führung einer Bundesstatistik und die Meldepflicht nach Artikel 4 des Fünften Gesetzes zur Reform des Strafrechts (5. StrRG) vom 18. Juni 1974 (Bundesgesetzbl. I Seite 1297), geändert durch Artikel 3 und Artikel 4 des Fünften Strafrechtsänderungsgesetzes vom 18. Mai 1976 (Bundesgesetzbl. I Seite 1213), gelten auch in dem in Artikel 3 des Einigungsvertrages genannten Gebiet.

8. Die Regelung des § 37 a des Bundessozialhilfegesetzes findet auch Anwendung bei Abbrüchen der Schwangerschaft nach Nummer 2 dieser Anordnung.

9. Bis zu einer Entscheidung des Gesetzgebers über eine etwaige Einführung einer kriminologischen Indikation und deren Feststellung können Versicherte der gesetzlichen Krankenversicherung und nach Beihilfevorschriften Anspruchsberechtigte bei einem Abbruch der Schwangerschaft auf Antrag Leistungen erhalten, wenn die Voraussetzungen der Nummer 2 dieser Anordnung vorliegen und der zuständige Amtsarzt oder ein Vertrauensarzt der gesetzlichen Krankenkasse bescheinigt hat, daß nach seiner ärztlichen Erkenntnis an der Schwangeren eine rechtswidrige Tat nach den §§ 176 bis 179 des Strafgesetzbuches begangen worden ist und dringende Gründe für die Annahme sprechen, daß die Schwangerschaft auf der Tat beruht. Der Arzt kann mit Einwilligung der Frau eine Auskunft bei der Staatsanwaltschaft einholen und etwa vorhandene Ermittlungsakten einsehen; die hierbei gewonnenen Erkenntnisse unterliegen einer ärztlichen Schweigepflicht.

(...)

11. Dem Gesetzgeber ist es verfassungsrechtlich grundsätzlich nicht verwehrt, zu einem Konzept für den Schutz des ungeborenen Lebens überzugehen, das in der Frühphase der Schwangerschaft in Schwangerschaftskonflikten den Schwerpunkt auf die Beratung der schwangeren Frau legt, um sie für das Austragen des Kindes zu gewinnen,

und dabei auf eine indikationsbestimmte Strafdrohung und die Feststellung von Indikationstatbeständen durch einen Dritten verzichtet.

12. Ein solches Beratungskonzept erfordert Rahmenbedingungen, die positive Voraussetzungen für ein Handeln der Frau zugunsten des ungeborenen Lebens schaffen. Der Staat trägt für die Durchführung des Beratungsverfahrens die volle Verantwortung.

13. Die staatliche Schutzpflicht erfordert es, daß die im Interesse der Frau notwendige Beteiligung des Arztes zugleich Schutz für das ungeborene Leben bewirkt.

(...)

15. Schwangerschaftsabbrüche, die ohne Feststellung einer Indikation nach der Beratungsregelung vorgenommen werden, dürfen nicht für gerechtfertigt (nicht rechtswidrig) erklärt werden. Es entspricht unverzichtbaren rechtsstaatlichen Grundsätzen, daß einem Ausnahmetatbestand rechtfertigende Wirkung nur dann zukommen kann, wenn das Vorliegen seiner Voraussetzungen unter staatliche Verantwortung festgestellt werden muß.

16. Das Grundgesetz läßt es nicht zu, für die Vornahme eines Schwangerschaftsabbruchs, dessen Rechtmäßigkeit nicht festgestellt wird, einen Anspruch auf Leistungen der gesetzlichen Krankenversicherung zu gewähren. Die Gewährung von Sozialhilfe für nicht mit Strafe bedrohte Schwangerschaftsabbrüche nach der Beratungsregelung in Fällen wirtschaftlicher Bedürftigkeit ist demgegenüber ebensowenig verfassungsrechtlich zu beanstanden wie die Fortzahlung des Arbeitsentgeltes.

For the full version of the decision of the German Constitutional Court, see: Bundesverfassungsgericht, (Karlsruhe, 28-5-1993),

"Schwangerschaftsabbruch nach zielorientierter Beratung und Verzicht auf indikationsbestimmte Strafdrohung", in: Europäische Grundrechte Zeitschrift, 4-6-1993, n. 9-10.

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